89-1800

No. _____

Supreme Court, U.S.
FILED
MAY 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

ASSAY PARTNERS,

Petitioner,

v.

CITY OF NEW YORK, DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK, and ABRAHAM BIDERMAN, as Commissioner,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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QUESTIONS PRESENTED

1. Whether, under the Supremacy Clause of the United States Constitution, the New York City Real Property Transfer Tax unconstitutionally discriminates against the United States and those dealing with the United States by levying the Tax on a sale by the United States of realty (at the grantee level) but exempting from that Tax a sale by an international organization?

2. Whether, under the Supremacy Clause of the United States Constitution, the New York City Real Property Transfer Tax unconstitutionally discriminates against the United States and those dealing with the United States by levying the Tax on a sale by the United States of realty (at the grantee level) but exempting from that Tax a sale by an educational, charitable or religious organization?

PARTIES

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ASSAY PARTNERS,

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CITY OF NEW YORK, DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK, and ABRAHAM BIDERMAN, as Commissioner,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

OPINIONS BELOW

The opinion of the New York State Supreme Court, Appellate Division, First Department, is officially reported as *Assay Partners*

v. *City of New York*, 149 A.D.2d 63 (1st Dep't 1989) and appears in Appendix A hereto at 5a-13a. The administrative decision of the New York City Department of Finance, which is not officially reported, appears in Appendix E hereto at 22a-29a. The administrative denial of the refund claim filed by petitioner Assay Partners ("Assay"), a New York general partnership, which is not officially reported, appears in Appendix F hereto at 30a-34a.

JURISDICTION

The judgment of the Appellate Division was entered on August 10, 1989. Assay's appeal as of right to the New York State Court of Appeals pursuant to N.Y. Civ. Prac. L. & R. 5601(b)(1) (McKinney 1978) was dismissed by that Court *sua sponte* on November 30, 1989. The dismissal is officially reported as *Assay Partners* v. *City of New York*, 74 N.Y.2d 944 (1989), and the order of dismissal appears in Appendix C hereto at 16a-17a. Assay's subsequent motion for discretionary review (leave to appeal) pursuant to N.Y. Civ. Prac. L. & R. 5514 and 5602(a)(1)(i) (McKinney 1978 & Supp. 1990) was denied by the Court of Appeals on February 15, 1990. The denial is officially reported as *Assay Partners* v. *City of New York*, 75 N.Y.2d 705 (1990), and the order of denial appears in Appendix B hereto at 14a-15a. In accordance with Rule 13.1 of this Court, this petition is filed within 90 days of the date of denial of discretionary review (leave to appeal). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988) because the judgment of the Appellate Division sought to be reviewed draws into question the validity of a statute of a State on the ground of its being repugnant to the Constitution

of the United States and, in addition, because an immunity is claimed under the Constitution.[1]

As required by Rule 29.4(c) of this Court, Assay states that 28 U.S.C. § 2403(b) (1988) may be applicable because this proceeding draws into question the constitutionality of a State statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

The "Supremacy Clause" of the United States Constitution, U.S. Const. art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in

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[1]The N.Y.C. Administrative Code was originally adopted by the New York State Legislature as chapter 929 of the Laws of 1937. The New York City Real Property Transfer Tax, at issue in this case, was added to the N.Y.C. Administrative Code as an amendment thereto adopted by the New York City Council on July 22, 1965 as L.L. 1965, No. 78. On August 2, 1985, the N.Y.C. Administrative Code was recodified by the New York State Legislature as chapter 907 of the Laws of 1985. In any event it is clear that, for purposes of jurisdiction under 28 U.S.C. § 1257, "statute of any State" includes municipal laws. *See, e.g., King Mfg. Co.* v. *City Council of Augusta*, 277 U.S. 100, 104 (1928).

> the Constitution or Laws of any State to the Contrary notwithstanding.

B. Statutory Provisions

Section 11-2102(a)(8) of the New York City Real Property Transfer Tax ("NYC Transfer Tax" or "Tax"), N.Y.C. Admin. Code § 11-2102(a)(8) (1986 & Supp. 1989) (formerly § 1146-2.0(a)(8)), provides in pertinent part:

> (a) A tax is hereby imposed on each deed at the time of delivery by a grantor to a grantee when the consideration for the real property and any improvement thereon (whether or not included in the same deed) exceeds twenty-five thousand dollars. The tax shall be. . .
>
> (8) at the rate of two percent of the consideration with respect to all other conveyances made on or after July first, nineteen hundred eighty-two. . . .[2]

Section 11-2104 of the NYC Transfer Tax, N.Y.C. Admin. Code § 11-2104 (1986 & Supp. 1989) (formerly § 1146-4.0), provides in pertinent part:

> The tax imposed hereunder shall be paid by the grantor. . . . The grantee shall also be liable for the

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[2]Effective for conveyances on or after August 1, 1989, the NYC Transfer Tax rate has generally been increased to 2.625%. *See* section 11-2102(a)(9) of the NYC Transfer Tax (N.Y.C. Admin. Code § 11-2102(a)(9); 4 N.Y. St. Tax Rep. (CCH) ¶ 392-358 (July 1, 1989)).

> payment of such tax in the event that . . . the grantor is exempt from tax.

Sections 11-2106(a)(1) and (2) of the NYC Transfer Tax, N.Y.C. Admin. Code §§ 11-2106(a)(1) and (2) (1986) (formerly §§ 1146-6.0(a)(1) and (2)), provide in pertinent part:

> (a) The following shall be exempt from the payment of the tax imposed by this chapter and from filing a return:
>
> (1) The state of New York, or any of its agencies, instrumentalities, public corporations . . . or political subdivisions;
>
> (2) The United States of America, and any of its agencies and instrumentalities, insofar, as they are immune from taxation, provided, however, that the exemption of such governmental bodies or persons shall not relieve a grantee from them of liability for the tax or from filing a return.

Sections 11-2106(b)(1) and (2) of the NYC Transfer Tax, N.Y.C. Admin. Code §§ 11-2106(b)(1) and (2) (1986 & Supp. 1989) (formerly §§ 1146-6.0(b)(1) and (2)), provide in pertinent part:

> (b) The tax imposed by this chapter shall not apply to any of the following deeds . . .
>
> (1) A deed . . . conveying or transferring real property . . . by or to the United Nations or other

> world-wide international organizations of which the United States of America is a member;
>
> (2) A deed . . . conveying or transferring real property . . . by or to any corporation, or association, or trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, or educational purposes. . . .

STATEMENT OF THE CASE

The important issue raised by this case is whether a state or local real property transfer tax discriminates against the United States and those dealing with the United States in violation of the Supremacy Clause if the United States and its grantees are burdened by the added transactional cost of the tax but international organizations and their grantees, and charitable organizations and their grantees, are exempt from the tax. The opinion below decided this constitutional issue in a way that conflicts with applicable decisions of this Court, particularly *Davis* v. *Michigan Department of Treasury*, __ U.S. __, 109 S. Ct. 1500 (1989).

This is an issue of great practical significance not only because of the enormous current value of federally-owned property but also because of the virtual certainty that federal ownership of property will increase dramatically as the United States Government, as part of the "thrift bailout,"[3] takes over properties owned by failing financial institutions. The job of the Resolution

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[3]*See* Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 *et seq.* (1989).

Trust Corporation and the Federal Deposit Insurance Corporation pursuant to FIRREA to resell these acquired properties at the highest possible price will be considerably hampered if sales by the United States can be singled out for real property transfer taxation while sales by international organizations and charitable organizations are exempt from these taxes. *See generally* Nash, *Savings Bailout Agency to Allow Large Cuts in Prices of Real Estate*, N.Y. Times, May 9, 1990, at A1, col. 4.

In this case, the New York City Real Property Transfer Tax burdens the United States and those dealing with the United States by subjecting its grantees to the Tax, although grantees of international organizations and grantees of charitable organizations are exempt from the Tax. If the United States and, for example, the International Coffee Organization — which falls within the exempt class[4] — each owned an undivided 50% interest in a parcel of real property located in Manhattan, the Tax would be levied upon the sale of the 50% interest by the United States but the sale by the International Coffee Organization of its 50% interest to the same buyer would be exempt from the Tax. The Tax thus clearly discriminates against the United States and its grantees because it applies to these grantees but not to grantees of others.

Moreover, the discrimination imposes a demonstrable economic burden on the United States and its grantees. A buyer's cost for a given piece of property (sales price plus NYC Transfer Tax) will be greater if it buys the property from the United States

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[4]*See generally* U.S. Dep't of State, Bureau of International Organization Affairs, Pub. 9723, 37th Ann. Rep., *United States Contributions to International Organizations* 102 (1989).

rather than the International Coffee Organization, thus making a buyer less willing to buy from the United States; alternatively, if in seeking to buy the United States's 50% interest, the buyer resists absorbing the cost of the NYC Transfer Tax and properly insists on paying the United States no more than it would have paid to the International Coffee Organization, the United States would have to accept a lower price to reflect its absorption of the cost of the Tax. The latter is precisely what would have happened in this case if Assay believed it was liable for the Tax. (Appendix ("App.") I at 44a-46a). Whether the United States gets a lower price, or the buyer is willing to pay a tax "penalty" for dealing with the United States, or the United States loses the sale altogether, the United States or its grantees suffer at the hands of the discriminatory NYC Transfer Tax.

A. Statement of Facts

The NYC Transfer Tax is imposed at the time a deed to real property located in New York City is delivered. N.Y.C. Admin. Code § 11-2102 (formerly § II46-2.0). The Tax ordinarily is imposed on the grantor, but the grantee is also liable if the grantor is exempt from the Tax. N.Y.C. Admin. Code § 11-2104 (formerly § II46-4.0).

Certain entities are expressly exempt from the NYC Transfer Tax, whether they are the grantor or the grantee of property. These exempt entities include:

1. the United States (N.Y.C. Admin. Code § 11-2106(a)(2) (formerly § II46-6.0(a)(2)));

2. the "United Nations or other world-wide international organizations of which the United States of America is a member" (hereinafter "international organizations") (N.Y.C. Admin. Code § 11-2106(b)(1) (formerly § 1146-6.0(b)(1))); and

3. organizations "organized and operated exclusively for religious, charitable, or educational purposes. . . ." (hereinafter "charitable organizations") (N.Y.C. Admin. Code § 11-2106(b)(2) (formerly § 1146-6.0(b)(2))).

In addition, the grantees of certain entities are exempt from the NYC Transfer Tax. These exempt grantees include:

1. grantees of international organizations (N.Y.C. Admin. Code § 11-2106(b)(1) (formerly § 1146.6.0(b)(1))); and

2. grantees of charitable organizations (N.Y.C. Admin. Code § 11-2106(b)(2) (formerly § 1146-6.0(b)(2))).

By contrast, *grantees of the United States are expressly subject to the NYC Transfer Tax*. N.Y.C. Admin. Code § 11-2106(a)(2) (formerly § 1146-6.0(a)(2)). Thus, sales between a private party and an international organization (or a charitable organization) are completely exempt from the NYC Transfer Tax. However, sales between the United States and a private party are subject to the Tax.

In November 1983, Assay purchased a building located in Manhattan from the United States for some $27,000,000. Under the terms of the NYC Transfer Tax, although the United States (as grantor) was exempt from the Tax, Assay, as grantee of the United States, was required to, and did, pay NYC Transfer Tax of $540,200 in connection with the sale. In the absence of such payment, the N.Y.C. Register of Deeds would refuse to record Assay's title to the building it had just purchased.

B. Prior Proceedings

In 1984, Assay filed a claim for refund of the NYC Transfer Tax paid, arguing that the NYC Transfer Tax discriminated against the United States and those with whom the United States deals in violation of the Supremacy Clause of the United States Constitution because grantees of the United States, who are expressly subject to the Tax, are treated worse than grantees of charitable organizations and grantees of international organizations, who are expressly exempt from the Tax. (App. G at 35a-37a). The claim was denied on the grounds that the Tax was constitutional. (App. F at 30a-34a). Thereafter, Assay commenced an administrative proceeding before the New York City Department of Finance ("Department") to obtain a refund. In its Petition for an administrative hearing and at the hearing held on October 21, 1985, Assay raised the same Supremacy Clause objections. (App. H at 38a-39a; App. I at 40a-43a). The Department's administrative decision dated October 29, 1987 denied Assay's Petition for a refund of the Tax, finding that the Department did not have the authority to resolve Assay's constitutional claims. (App. E at 28a).

Assay next commenced an appeal to the courts by filing a Verified Petition in the Supreme Court, State of New York. In that Petition, Assay reasserted its Supremacy Clause claims. (App. J at 47a-61a). Without reaching the merits, the Supreme Court transferred the matter to its Appellate Division, First Department, by Order entered September 21, 1988. (App. D at 18a-19a). In briefs required to be filed in the Appellate Division, Assay continued to press its Supremacy Clause claims. (App. K at 62a-70a).

The decision of the Appellate Division dated and entered August 10, 1989 upheld the administrative denial of Assay's refund request. (App. A at 5a-13a). The Court viewed *United States* v. *Department of Revenue of Illinois*, 202 F. Supp. 757 (N.D. Ill.), *aff'd per curiam*, 371 U.S. 21 (1962), as controlling precedent establishing that it is constitutional to treat grantees of the United States worse than grantees of charitable organizations. With respect to the constitutionality of treating grantees of the United States worse than grantees of international organizations, the Appellate Division decided against Assay here too, on the grounds that, based on public policy considerations, it "would appear reasonable" for New York City to place international organizations in the same favored category as charitable organizations. (App. A at 11a).

Thereafter, in October 1989, Assay filed an appeal as of right (and supporting Jurisdictional Statement) to the New York Court of Appeals pursuant to N.Y. Civ. Prac. L. & R. 5601(b)(1) (McKinney 1978), on the grounds that the NYC Transfer Tax violated the Supremacy Clause because it treated grantees of the United States worse than grantees of international organizations and

grantees of charitable organizations. (App. L at 71a-81a). On November 30, 1989, Assay's appeal was dismissed by the Court *sua sponte*. (74 N.Y.2d 944; App. C at 16a-17a). Assay then filed in the Court of Appeals a motion for discretionary review (leave to appeal), with accompanying affidavit, raising these Supremacy Clause claims again. (App. M at 82a-91a). The Court of Appeals denied Assay's motion on February 15, 1990. (75 N.Y.2d 705; App. B at 14a-15a).

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES IMPORTANT NOVEL CONSTITUTIONAL QUESTIONS AS TO WHETHER A TAX STATUTE LIKE THE NEW YORK CITY REAL PROPERTY TRANSFER TAX DISCRIMINATES AGAINST THE UNITED STATES AND THOSE WITH WHOM IT DEALS IN VIOLATION OF THE SUPREMACY CLAUSE BY TAXING SALES OF REALTY BY THE UNITED STATES BUT EXEMPTING FROM TAX SALES BY INTERNATIONAL ORGANIZATIONS AND SALES BY CHARITABLE ORGANIZATIONS

A. The tests of constitutionality under the Supremacy Clause that govern this case are set forth in this Court's decisions in *Davis* v. *Michigan Department of Treasury* and *Phillips Chemical Co. v. Dumas Independent School District*

This case invites the Court to decide whether, under the Supremacy Clause, a real property transfer tax statute unconstitutionally discriminates against the United States and those

dealing with the United States if the statute taxes private commercial grantees of the United States but does not tax private commercial grantees of international organizations or private commercial grantees of charitable organizations. *With respect to the treatment of grantees of the United States compared to grantees of international organizations, this is a case of first impression.* With respect to the treatment of grantees of the United States compared to grantees of charitable organizations, no opinion of this Court has ever resolved this issue. However, by applying to this case the tests of constitutionality recently reaffirmed by this Court in *Davis* v. *Michigan Department of Treasury*, __ U.S. __, 109 S. Ct. 1500 (1989), it must be concluded that the Supremacy Clause is violated if a state or local tax statute discriminates against the United States by taxing sales of realty by the United States but exempting from that tax sales of realty by international organizations or by charitable organizations to equivalent grantees.

Davis involved the Michigan Income Tax which taxed retirement benefits paid by the United States and by every other employer except the State of Michigan and its political subdivisions. When a former federal employee sued for a refund of Michigan tax paid on his federal retirement benefits, this Court held that the Michigan tax violated the immunity doctrine by treating retired federal employees worse than retired state and local employees. 109 S. Ct. at 1508. This discrimination against federal employees was held unconstitutional under the governing tests announced by this Court in *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376, 383, *reh'g denied*, 362 U.S. 937 (1960), because the discrimination was not justified by meaningful differences between the two classes of retirees. Acknowledging that the State of Michigan had substantial public

policy reasons for treating Michigan retirees better than federal retirees, this Court in *Davis* nonetheless held that the existence of these reasons was irrelevant because public policy considerations do not constitute a constitutionally-significant "meaningful difference" between the two classes for purposes of the Supremacy Clause.[5] *See also United States* v. *City of Manassas, Va.*, 830

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[5]The *Davis* Court stated (109 S. Ct. at 1508 (citations omitted)):

> In determining whether th[e] standard of justification [derived from *Phillips*] has been met, . . . "our decisions in [the equal protection] field are not necessarily controlling. . . ." Instead, the relevant inquiry is whether the inconsistent tax treatment is directly related to and justified by "significant differences between the two classes."
>
> . . .[T]he State suggests that its interest in hiring and retaining qualified civil servants through the inducement of a tax exemption for retirement benefits is sufficient to justify the preferential treatment of its retired employees. This argument is wholly beside the point, however, for it does nothing to demonstrate that there are "significant differences between the two classes" themselves; rather, it merely demonstrates that the State has a rational reason for discriminating between two similar groups of retirees. The State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment.
>
> Second, the State argues that [because] its retirement benefits are significantly less munificent than those offered by the Federal Government, . . . differences in the value of the retirement benefits paid the two classes should . . . justify the inconsistent tax treatment.
>
> . . . [W]e do not believe this difference suffices to justify the type of blanket exemption at issue in this case. . . . *A tax exemption truly intended to account for differences in retirement benefits would not discriminate on*

(continued...)

F.2d 530 (4th Cir. 1987), *aff'd*, 485 U.S. 1017 (1988).

B. Under the tests announced by this Court, grantees of the United States are not different from grantees of international organizations or grantees of charitable organizations and, as a result, under the Supremacy Clause as interpreted by this Court in *Davis* and *Phillips*, the New York City Real Property Transfer Tax may not treat grantees of the United States worse than these other grantees

It is apparent that the NYC Transfer Tax discriminates against grantees of the United States because it taxes them but does not tax grantees of international organizations or grantees of charitable organizations.[6] This discrimination violates the Supremacy Clause under the governing standards announced in *Davis* and *Phillips* unless, *without regard to public policy considerations or the taxing authority's interest in adopting the Tax*, there are "meaningful differences" between the favored and disfavored classes of grantees. On the basis of the *Davis* and *Phillips* rationales, there are none.

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[5](...continued)
the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees. (Emphasis added).

[6]No statute or international agreement requires grantees of the United Nations to be exempt from the NYC Transfer Tax. *See Convention on the Privileges and Immunities of the United Nations*, Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. 6900, 1 U.N.T.S. 15.

Phillips found that all lessees using tax-exempt property for a nonexempt purpose were similarly-situated and should be taxed alike, where the taxing authority adduced no reason (other than policy reasons and the authority's need for revenue) to support the differential tax classification. 361 U.S. at 381-85. This Court's teaching in *Phillips* and *Davis* is undermined if private commercial grantees of property sold by the United States and private commercial grantees of property sold by international organizations or charitable organizations are held not to constitute one similarly-situated class of user, as the Appellate Division held. In each case, the grantees use similar property (*i.e.*, property acquired from an entity exempt from the NYC Transfer Tax) for a similar purpose (*i.e.*, for a private business purpose). No constitutionally meaningful differences exist between these two groups of grantees, in light of the fact that *Davis* and *Phillips* clearly exclude from consideration differences which arise out of public policy considerations (such as a public policy to induce individuals to work for the state, or to encourage charitable pursuits, or to raise revenue). In these circumstances, grantees of the United States cannot bear a heavier NYC Transfer Tax burden than these other grantees under the principles announced in *Davis* and *Phillips*. These principles do not require "charity bashing" or any preferential tax treatment for the United States; they only require equality of tax treatment for the United States and its grantees compared to these other persons.

C. The opinion below conflicts with this Court's decisions in *Davis* and *Phillips*, and applies the wrong tests to determine the constitutionality of discrimination against the United States by treating its grantees worse than grantees of international organizations

The Appellate Division held that the NYC Transfer Tax could constitutionally exempt grantees of international organizations from the Tax, even though it taxed grantees of the United States, because "it would appear reasonable" for New York City to extend tax exemptions to international organizations since those organizations "have been formed to carry out many of the functions" of religious, charitable and educational institutions, and because such exemptions further public policy by welcoming and supporting international endeavors. (App. A at 11a). In finding the discrimination against the United States constitutionally permissible because it was based on public policy considerations and an Equal Protection Clause-"reasonable basis" type analysis, the Appellate Division's opinion ignores the fact that these are precisely those considerations this Court has rejected in *Davis* and *Phillips* as irrelevant to the Supremacy Clause analysis. The Appellate Division, respectfully, disparages the *Davis* and *Phillips* test of constitutionality which requires consideration as to whether the two classes of grantees are similar or different. By applying the wrong test, the Appellate Division reached the wrong conclusion, and its opinion flatly conflicts with the rules of law announced by this Court in *Davis* and *Phillips*.

Furthermore, not only did the Appellate Division apply the wrong test, but it applied the wrong test incorrectly. The Appellate Division supplied its own formulation of public policy when it

assumed that, because international organizations are formed to carry out many of the functions of charitable organizations, it would be reasonable as a public policy matter to treat all of these organizations in the same way. The Appellate Division's stated premise for this assumption is simply wrong, since many international organizations, such as the International Coffee Organization and the International Sugar Organization, operate purely as economic cartels that benefit a particular economic interest group. *See generally* U.S. Dep't of State, Bureau of International Organization Affairs, Pub. 9723, 37th Ann. Rep., *United States Contributions to International Organizations* at 102, 116, 123, 128 (1989).

Moreover, given the enormous social welfare and educational budget of the federal government,[7] it seems clearly erroneous to posit, as the Appellate Division does, that an even-handed application of the rationale of "good deeds done" justifies exemption of international organizations, on the one hand, and taxation of the United States, on the other. *Cf. Davis*, 109 S. Ct. at 1508; *Phillips*, 361 U.S. at 384-85 (both rejecting proffered rationale of taxing authority's unfavorable tax treatment of federal retirees/lessees because an even-handed application of the rationale would have resulted in inclusion of some members of the favored class in the disfavored class along with federal retirees/lessees). Finally, if it were appropriate to "guess," as the Appellate Division did, at the reasons behind the tax exemption accorded to

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[7]The combined budget of the U.S. Department of Education and the U.S. Department of Health and Human Services alone exceeded $330 billion and $364 billion in fiscal 1990 and fiscal 1991, respectively. *See* Executive Office of the President, Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1991*, A-200, A-212 (1990).

international organizations, it hardly needs mention that, in inducing international organizations to locate in New York by extending the exemption, the City was responding to its desire to raise revenue, as it is well known, for example, that the presence in New York City of the United Nations alone generates a direct net benefit to the City of about $700 million a year. *See* New York City Commission for the United Nations and Consular Corps, *The Economic Impact of the Diplomatic Community on the City of New York* at 8, 10, 18 (1989).

D. The constitutionality of discrimination against the United States by treating its grantees worse than grantees of charitable organizations is not resolved by *United States* v. *Department of Revenue of Illinois*, which the Appellate Division relied on

1. *Illinois* is not controlling precedent

The court below relied on *United States* v. *Department of Revenue of Illinois*, 202 F. Supp. 757 (N.D. Ill.), *aff'd per curiam*, 371 U.S. 21 (1962), as "controlling precedent" binding that court to conclude that, because there is a "reasonable basis" (in the Equal Protection Clause sense) for separate classification of charitable organizations, on the one hand, and governmental units, on the other, it is constitutionally permissible to treat grantees of the United States worse than grantees of charitable organizations. (App. A at 9a-10a). In doing so, the Appellate Division failed to recognize that doctrinal developments reaffirmed by this Court most recently in *Davis* have largely deprived *Illinois* of whatever precedential value *Illinois* had in the first place by virtue of this Court's summary affirmance. *See Tully* v. *Griffin, Inc.*, 429 U.S.

68, 74 (1976); *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975). In any event, whether or not the summary affirmance in *Illinois* bound the Appellate Division, it is clear that this Court is not bound to follow *Illinois*. Summary affirmances neither receive the full consideration, nor are accorded the full weight, of decisions argued on the merits and disposed of by written opinion, and do not foreclose this Court's opportunity to reconsider a question. *See, e.g., Edelman* v. *Jordan*, 415 U.S. 651, 670-71 (1974); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 309 n.1 (1976); *see generally* Rehnquist, *Whither the Courts*, 60 A.B.A. J. 787, 790 (July 1974).

2. The opinion below conflicts with *Davis* and *Phillips*, and fails to apply the tests of constitutionality announced by those decisions

The opinion below, and *Illinois* on which it relies, conflict with this Court's opinion in *Davis* and its interpretation of *Phillips*. *Davis* has implicitly overruled *Illinois*.

Illinois held that the Illinois Retailers' Occupation Tax Act could constitutionally tax retailers selling to the United States, even though it exempted retailers who sell to charities, schools and churches, because there was a "reasonable basis" for the separate classification. The reasonable basis relied on by the court was that, because charitable organizations provide valuable public services, their existence should be encouraged as a public policy matter through the economic subsidy of tax exemption. 202 F. Supp. at 759.

The valuable public services provided by charities and these other institutions is to be acknowledged and applauded. However, for purposes of determining whether a statute discriminates against the United States and those dealing with the United States in violation of the Supremacy Clause, this Court in *Davis* and in *Phillips* has held that public policy considerations, like the existence of a "rational or reasonable basis" for discriminating against the United States, are of no consequence because the taxing authority's "interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment." *Davis*, 109 S. Ct. at 1508; *see Phillips*, 361 U.S. at 384.

Under this standard, the fact that charities and educational institutions may need funds to provide important services has nothing to do with the essential similarity between retailers who sell goods to the United States for a profit compared to retailers who sell goods to a charity for a profit (as in *Illinois*); similarly, it has nothing to do with the essential similarity between private grantees who buy property from the United States for use in a private commercial enterprise (as in this case) compared to private grantees who buy property from a charitable organization for use in a private commercial enterprise. Since there are no meaningful differences between these two classes of grantees, grantees of the United States cannot bear a heavier tax under *Davis* than these other grantees.

II. THE SUPREMACY CLAUSE'S REQUIREMENT THAT A STATE OR LOCAL STATUTE NOT DISCRIMINATE AGAINST THE UNITED STATES AND THOSE DEALING WITH THE UNITED STATES IS NOT LIMITED TO INTERGOVERNMENTAL PREFERENCES

This case also directly puts in question, for the first time, whether, in the absence of "meaningful differences" (as set forth in *Davis* and *Phillips*) between two classes of grantees, the Supremacy Clause bars a taxing authority from discriminating against the United States by treating grantees of private parties better than grantees of the United States, even though grantees of the United States are treated the same as grantees of state and local governmental units. In this case, moreover, grantees of *all* governmental units are *not* treated the same as grantees of the United States. Although grantees of international organizations are exempt from the Tax, at least one international organization, the United Nations, is equivalent to a government.[8]

No opinion of this Court has been found that has decided — or (to the extent one can tell) has been asked to decide — this issue. *See Phillips*, 361 U.S. at 386; *United States* v. *County of*

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[8] *See, e.g., Shamsee* v. *Shamsee*, 74 A.D.2d 357, 361, 428 N.Y.S.2d 33, 35 (2d Dep't 1980), *aff'd*, 53 N.Y.2d 739, 421 N.E.2d 848, 439 N.Y.S.2d 356, *cert. denied*, 454 U.S. 893 (1981); *Means* v. *Means*, 60 Misc. 2d 538, 539, 303 N.Y.S.2d 424, 426 (Fam. Ct. 1969); International Organizations Immunities Act ("Act"), 22 U.S.C. §§ 288a(b), 288a(d), 288d(a) (1988); *Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations*, June 26, 1947, 61 Stat. 756, T.I.A.S. 1676, §§ 8, 9; Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946).

Fresno, 429 U.S. 452, 471-72 (1977) (Stevens, J., dissenting) (pointing out the Court's failure to consider the issue). Language used by this Court in various decisions to describe the scope of the immunity doctrine, however, clearly indicates that the doctrine requires that those dealing with the United States be given equal tax treatment with *all* similarly-situated persons whether they deal with private parties or other governmental units. *See, e.g., County of Fresno*, 429 U.S. at 462, 463 n.11; *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 439 (1819).

The immunity doctrine was conceived and operates as a check against the danger that a state or locality might exercise its taxing power in a way that burdens the federal government and makes it dependent on the states. *See M'Culloch*, 17 U.S. (4 Wheat.) at 436, 439. This danger clearly exists when a state or locality directly taxes only the United States or those with whom the United States deals. *Id.* However, because the constitutionally offensive burden on the United States derives from the existence of *exemptions* granted to some persons and not to the United States, the danger is no less present when a state or locality taxes itself as well as the United States, but exempts others (private parties) from taxation. That the state may suffer as well does not eliminate the burden on the United States derived from tax preferences accorded by the state to someone else.[9] If the rule were otherwise — as the

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[9]That the state may suffer as well does, however, explain why the states usually place themselves in the exempt class as a practical matter. While the risk of a burdensome tax may be greatest when the state places itself in the exempt class, a state's decision to place itself in the burdened class (as in the case of the NYC Transfer Tax) does not diminish the burden on the United States imposed by exemptions granted by the state to others.

Appellate Division believes — then the immunity doctrine would prevent the states from crippling the United States by direct taxation but would not prevent the states from doing so by indirection (*i.e.*, by awarding tax exemptions to private parties that the United States did not enjoy), as in this case. The practical effect of such a rule, as set out by the court below, is to severely undercut — if not completely vitiate — the immunity doctrine itself and the teachings of *Davis* and *Phillips*.

This Court has recognized that, notwithstanding the size of the group (including the United States) that is subject to a tax compared to the size of the group that is exempt, the existence of an exemption accorded to some without "justification" (as defined by this Court in both *Davis* and *Phillips*) violates the Supremacy Clause because, however broad in its sweep the tax may be, as a constitutional or practical matter, its breadth does not eliminate the burden on the United States that arises out of the exemption. Thus, in both *Davis* and *Phillips*, this Court invalidated tax statutes on Supremacy Clause grounds because of exemptions granted to a few, even though the vast majority of the taxing authority's affected constituents (*e.g.*, retirees, lessees) were subject to the discriminatory tax (or an equivalent tax). *See Davis*, 109 S. Ct. at 1511; *Phillips*, 361 U.S. at 380-81.

No suggestion is made here that the immunity doctrine is a "most favored nation provision" requiring states and localities *per se* to accord those dealing with the United States the greatest tax benefit that they give any other group. To the contrary, the concept of "justification" for differential tax treatment of two classes as developed in *Davis* and *Phillips* limits the scope of the immunity doctrine by identifying those burdens on the United

States which are constitutionally permissible. Failing this test of justification, this Court should confirm that an unjustified burden on the United States which favors private parties is no less constitutionally offensive and actionable under the Supremacy Clause than an unjustified burden which favors another governmental entity.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Appellate Division.

Respectfully submitted,

NORMAN SINRICH
30 Rockefeller Plaza
New York, New York 10112
(212) 408-5325
Counsel of Record and Attorney for Petitioner Assay Partners

NANCY W. PIERCE
CHADBOURNE & PARKE
Of Counsel

May 15, 1990

APPENDICES

APPENDIX A — OPINION AND ORDER (WITH NOTICE OF ENTRY) OF THE STATE OF NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED AUGUST 10, 1989

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on August 10, 1989.

Present—Hon. Theodore R. Kupferman, Justice Presiding
John Carro
Sidney H. Asch
Betty Weinberg Ellerin
George Bundy Smith, Justices.

In the Matter of the Application of
ASSAY PARTNERS,

Petitioner,

For a judgment pursuant to CPLR Article 78 of, in the alternative, for a Declaratory judgment or for such other Judgment and relief as is specified herein,

-against-

CITY OF NEW YORK, DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK
and ABRAHAM BIDERMAN, as Commissioner.

Respondents.

NO. 36999

Appendix A

The above-named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondent Commissioner dated October 29, 1987, upholding a real estate transfer tax payment and denying petitioner a refund,

And this proceeding having been transferred by order of said court, entered on September 21, 1988, (Francis Pecora, J.), to this Court for review and determination,

And said proceeding having duly come on to be heard before this Court and having been argued by Norman Sinrich, of counsel for the petitioner, and by Anshel David, of counsel for the respondents; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered that the determination of the respondent Commissioner be and the same hereby is confirmed, without costs and without disbursements. The clerk is directed to enter judgment in favor of respondents confirming the determination.

ENTER:

/STAMP/_____

Clerk

Appendix A

PLEASE TAKE NOTICE, that an order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the 1st Judicial Department on the 10 day of August, 1989

Yours, etc.,

PETER L. ZIMROTH,
Corporation Counsel,
Attorney for Respondents
100 Church Street,
New York, N.Y. 10007
Telephone: 566-4178

To:
CHADBOURNE & PARKE, Esq.,
Attorney for Petitioner
30 Rockefeller Plaza
New York, New York 10112

Appendix A

NEW YORK SUPREME COURT
Appellate Division, 1st Department

In the Matter of the Application of
ASSAY PARTNERS,

Petitioner,

-against-

CITY OF NEW YORK, DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK
and ABRAHAM BIDERMAN, as Commissioner.

Respondents.

APPELLATE DIVISION ORDER AND NOTICE OF ENTRY

PETER L. ZIMROTH,
Corporation Counsel,

Attorney for_____
100 Church Street
New York, N.Y. 10007

Due and timely service of a copy of the within Order and Notice of Entry is hereby admitted.

New York, _____, 19

_____
Attorney for

To

_____, Esq.
Attorney for

Appendix A

DECISION OF THE APPELLATE DIVISION DATED AUGUST 10, 1989

Theodore R. Kupferman, J.P.
John Carro
Sidney H. Asch
Betty Weinberg Ellerin
George Bundy Smith, JJ.

In the Matter of the Application of
ASSAY PARTNERS,

Petitioner,

For a judgment pursuant to CPLR Article 78 or, in the alternative, for a Declaratory Judgement or for such other Judgment and relief as is specified herein,

against

CITY OF NEW YORK, DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK,
and ABRAHAM BIDERMAN, as Commissioner,

Respondents.

NO. 36999

Appendix A

In this proceeding transferred to this Court by order of the Supreme Court, New York County (Francis Pecora, J.), entered September 21, 1988, petitioner challenges a determination dated October 29, 1987 upholding a real estate transfer tax payment and denying petitioner a refund.

Norman Sinrich, of counsel (Nancy W. Pierce and Lawrence E. Savell with him on the brief; Chadbourne & Parke, attorneys) for petitioner; Anshel David, of counsel (Edith I. Spivack and Peter Rabinowitz, with him on the brief; Peter L. Zimroth, attorney) for the respondent.

ASCH, J.

Petitioner Assay Partners purchased the Assay Building, in downtown Manhattan, from the United States Government for $27,100,000 on November 1, 1983. Assay subsequently paid the municipal Real Property Transfer Tax for the transaction, to respondent New York City Department of Finance, under protest.

Administrative Code of the City of New York § 11-2101 *et seq.* (formerly Administrative Code §§ 1146-1.0 *et seq.*) imposes a tax on all transfers of real property in New York City over $25,000 (in the present case) at a rate of 2% of the total sales price. The statute provides for payment of the Transfer Tax by the property grantor. If the grantor does not pay the tax, or is exempt from it, the grantee or purchaser then becomes liable. (Section 11-2104, formerly § 1146-4.0.)

Appendix A

Certain entities, including the United States, are exempt from the tax. The statute provides in this respect:

> The following shall be exempt from the payment of the tax imposed by this title and from filing a return:
>
> 1. The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada) or political subdivisions;
>
> 2. The United States of America, and any of its agencies and instrumentalities, insofar as they are immune from taxation . . . .

(Section 11-2106[a], formerly § 1146-6.0[a].)

In addition, the Code goes on to provide (§ 11-2106[b], formerly § 1146-6.0[b]) as follows:

> The tax imposed by this title shall not apply to any of the following deeds:
>
> 1. a deed by or to the United Nations or other world-wide international organizations of which the United States of America is a member;
>
> 2. a deed by or to any corporation, or association, or trust, or community chest, fund or foundation,

> organized and operated exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals . . . .

The language used in this latter section effectively exempts both the grantor and the grantee from the Transfer Tax. However, this exemption language is *not* used and does not apply to grantees of the United States (or the State of New York and its agencies, etc.).

While Assay filed a return and paid the tax due as noted, it sought a refund. Its contention was (and is) that grantees of the United Nations and educational, charitable and other like institutions are exempt from the Transfer Tax, while grantees of the United States are not, and that this constitutes a violation of the Supremacy Clause of the United States Constitution (art VI, cl 2).

After a hearing before the respondent Finance Department, the respondent Commissioner denied the claim for a refund without ruling on the constitutional issue. Petitioner Assay thereupon commenced this article 78 proceeding seeking to have the Transfer Tax it paid set aside as unconstitutional and a refund paid to it with interest. The proceeding was transferred to this court by the Supreme Court.

The Supremacy Clause (US Const, art VI, cl 2) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

> United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Thus, "a state tax may not discriminate against the government or those with whom it deals" (58 NY Jur Rev, *Taxation*, § 27, p 64, citing *Phillips Chemical Co. v Dumas Indep. School Dist.*, 361 US 376, 387, *rearg denied* 362 US 937).

Petitioner Assay's contention that a state or local tax may not treat *anyone* better than the United States or those dealing with the United States misapprehends the nature of "discrimination" required before a breach of the Supremacy Clause is deemed to have been committed. Thus, in *United States v Illinois Department of Revenue* (371 US 21, *affg per curiam* 202 F Supp 757), the Supreme Court affirmed, without opinion, the decision of a three-judge District Court panel holding that a tax statute does not violate the Supremacy Clause solely because persons dealing with charitable, religious or educational organizations are accorded more favorable treatment than persons dealing with the United States or its instrumentalities. In *Illinois Department of Revenue*, the Federal government and others challenged an Illinois tax upon proceeds of retail sales within the state which exempted proceeds of sales to charitable, religious or educational organizations but gave no such exemption for sales to the Federal government, its instrumentalities or to other state and local governmental units. The District Court held that these differences between religious, charitable and educational organizations and governmental units provided a "reasonable basis for separate classification" and that there was no

discrimination since the federal and state governmental units were accorded equal treatment.

The Supreme Court's summary affirmance of this three-judge District Court holding is "a controlling precedent" (*see, Tully v Griffin, Inc.*, 429 US 68, 74) and is directly in point with the different treatment afforded petitioner as compared with grantees of charitable, educational and religious organizations.

While petitioner cites numerous cases in support of its contention that the instant Transfer Tax violates the Supremacy Clause, analysis of these matters shows that discriminatory treatment of the United States and its agencies is found only when other governmental units are treated in a preferred manner (*United States v City of Manassas*, 830 F2d 530, *affd* 108 S Ct 1568; *Phillips Chemical Co. v Dumas Indep. School District, supra; Moses Lake Homes, Inc. v Grant County*, 365 US 744; *Forbes v Department of Finance*, 66 NY2d 243). On the other hand, when the United States is treated the same as state governmental units, the challenges to the Supremacy Clause have been rejected (*Washington v United States*, 460 US 536; *United States v County of Fresno*, 429 US 452; *United States v City of Detroit*, 355 US 466).

Petitioner's claim that the added exemptions in this case to grantees of the United Nations and other international organizations, and not to grantees of the United States, discriminates against the United States, is also without merit. International organizations are composed of numbers of sovereign states, including the United States, bound together for various

purposes. It would appear reasonable for the City to place such organizations in the same category as religious, charitable and educational institutions, since they have been formed to carry out many of the functions of the latter institutions (*cf. Appelbaum v Deutsch*, 66 NY2d 975). It should be appreciated, in addition, that the City of New York, in extending such an exemption to the grantees of the United Nations and other international organizations, supports and furthers the public policy of the United States as the host country, by welcoming and supporting such international endeavors.

Besides the contention that the Transfer Tax is unconstitutional on its face, petitioner also argues that the tax is unconstitutional because the City administers it in a way so that those who deal with the City are treated in a preferential manner as compared with those who do business with the United States. In support of this contention, petitioner asserts it bought air rights owned by the City over property located directly across from the government building. Petitioner contends that the City structured the sale so as to first convey the air rights to the City's Public Development Corporation, which as a tax-exempt organization then reconveyed the air rights to petitioner. As a result of this, no transfer tax was payable by petitioner on the air rights conveyed.

However, it appears from the record that the primary purpose of this roundabout transaction was not to avoid a tax (to be paid by petitioner) but rather, to obviate the necessity for a public auction or a bid proceeding for the air rights.

Appendix A

While the facts upon which the instant claim is based are present in the record, the claim, based on the Public Development Corporation air rights transaction, that the statute was administered in a discriminatory manner, was not raised in the administrative hearing by petitioner and may, therefore, not be raised for the first time in this proceeding (*Henneken v State Tax Commission*, 114 AD2d 599, 600).

In any event, this showing by petitioner does not establish the existence of a consistent policy by the City of using the Public Development Corporation (or other exempt agency) to favor City grantees as opposed to discriminatory taxation of Federal grantees (*cf. Phillips Chemical Co. v Dumas Independent School District, supra; Moses Lake Homes, Inc. v Grant County, supra*). A statute which is facially constitutional may be held to be administered in an unconstitutional manner only where there is "a pattern of discrimination consciously practiced" (*Zorach v Clausen*, 303 NY 161, 174).

The single instance involving the Public Development Corporation offered by petitioner did not show a pattern or consistent policy. In fact, the evidence adduced by petitioner's witness makes it apparent that the real reason for the structure of the transaction was to avoid public bidding.

Accordingly, the determination by the respondent Abraham Biderman, as Commissioner of the Department of Finance of the City of New York, dated October 29, 1987, denying petitioner Assay Partners' application for a refund of the Real Estate Transfer Tax payment, should be confirmed, and the article 78 proceeding

transferred to this court by an order of the Supreme Court, New York County (F. Pecora, J.), entered September 21, 1988, should be dismissed, without costs or disbursements.

All concur

Order filed.

APPENDIX B — ORDER OF THE STATE OF NEW YORK COURT OF APPEALS DATED FEBRUARY 15, 1990 DISMISSING PETITIONER'S MOTION FOR LEAVE TO APPEAL

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of February A.D. 1990

Present, Hon. Sol Wachtler, Chief Judge, presiding.

MO. NO. 60

In the Matter of
ASSAY PARTNERS,

Appellant,

v.

CITY OF NEW YORK, et al.,

Respondents.

Appendix B

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX C — ORDER OF THE STATE OF NEW YORK COURT OF APPEALS DATED NOVEMBER 30, 1989 DISMISSING PETITIONER'S APPEAL AS OF RIGHT

STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirty day of November A.D. 1989

Present, Hon. Sol Wachtler, Chief Judge, presiding.

MO. NO. 1429 SSD 107

In the Matter of
ASSAY PARTNERS,

Appellant,

v.

CITY OF NEW YORK, et al.,

Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

Appendix C

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX D — ORDER OF THE STATE OF NEW YORK SUPREME COURT, NEW YORK COUNTY ENTERED SEPTEMBER 21, 1988

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

Part 23

Present: Hon. Pecora, Justice.

ASSAY PARTNERS

-against-

CITY OF N.Y., etc.

Index Number 4166/88

Motion Date 3-29-88

Motion Seq. No. 001

Upon the foregoing papers it is ordered that this Article 78 proceeding is respectfully referred to the Appellate Division, First Department for disposition pursuant to CPLR 7804 (g).

Appendix D

The petition challenges a determination by respondents rendered after a hearing, mandated by law, on the ground that said determination is not supported by substantial evidence on the record.

Filed Sep. 21, 1988
County Clerk's Office
New York /STAMP/

Dated September 14, 1988

/signature/
J.S.C.

APPENDIX E — FINAL DETERMINATION AND DECISION OF THE THE CITY OF NEW YORK DEPARTMENT OF FINANCE DATED OCTOBER 29, 1987

/LOGO/
THE CITY OF NEW YORK
DEPARTMENT OF FINANCE
ABRAHAM BIDERMAN, COMMISSIONER
BUREAU OF HEARINGS
The Municipal Building
One Centre Street
New York, N.Y. 10007

In Reply Refer To:
Tel. (718) 403-3700

Assay Partners
c/o HRO International, Ltd.
126 East 56th Street
New York, N.Y. 10022

Date: Oct. 29, 1987
In Re:

Name: Assay Partners
c/o HRO International, Ltd.
Address: 126 East 56th Street
New York, N.Y. 10022
Amount of Claim: $540,200.00
Tax: Real Property Transfer Tax
Period: November 1, 1983
Claim No.: N/A
Reg. No.: N/A
Empl. Indent. No.: 13-3212012

Appendix E

FINAL DETERMINATION

Please be advised that your claim for refund is hereby denied for the reasons checked below:

Based upon findings as a result of a hearing held at the Bureau of Hearings.

This determination is final and irrevocable.

Very truly yours,

s/Abraham Biderman
Abraham Biderman
Commissioner of Finance

/STAMP/ Service in an Article 78 proceeding must be made on the Commissioner of Finance

cc: Norman Sinrich, Esq
Chadbourne, Parke, Whiteside & Wolff
30 Rockefeller Plaza
New York, N.Y. 10112

Appendix E

/LOGO/
THE CITY OF NEW YORK
DEPARTMENT OF FINANCE
BUREAU OF HEARINGS
The Municipal Building
One Centre Street
New York, N.Y. 10007

FHD (178)-RP-10/87(0-0-0)
Real Property Transfer Tax
October 29, 1987

In the Matter of the Petition of
ASSAY PARTNERS

for Refund of Real Property Transfer Tax under Chapter 21 of Title 11 of the Administrative Code of the City of New York.

DECISION

Petitioner, Assay Partners, c/o H R O International, Ltd., 126 East 56th Street, New York, New York 10022, filed a petition for a refund of real property transfer tax under Chapter 21 of Title 11 (formerly Title II of Chapter 46) of the Administrative Code of the City of New York in connection with a deed delivered on November 1, 1983, transferring title to real property located in New York County at 32 Old Slip (Block 35, Lot 1).

A hearing was held before Stanley C. Nosol, Hearing Officer, at the offices of the Department of Finance on October 21, 1985.

Appendix E

Petitioners appeared by Chadbourne, Parke, Whiteside & Wolff (Norman Sinrich, Esq., of counsel). The Department of Finance appeared by Maria T. Jones, Esq. (Arthur S. Katz, Esq., of counsel).

ISSUE

Whether the imposition of the real property transfer tax on grantees of the United States Government is invalid under the Supremacy Clause of the United States Constitution (Art. VI, cl. 2) where grantees of certain exempt organizations are not required to pay the transfer tax.

FINDINGS OF FACT

1. On November 1, 1983, title to the real property located at 32 Old Slip, New York County (hereinafter referred to as "the Assay Building") was transferred by deed, dated October 31, 1983, from the United States Government, as grantor, to a partnership, Assay Partners, as grantee.

2. On November 2, 1983, a Real Property Transfer Tax Return was filed on behalf of the grantee, Assay Partners, with the City Register showing a tax due of $540,200.00 with the notation "being paid under protest, all rights reserved." The cashier's bank check with which the petitioner-grantee paid the real property transfer tax

due also bore the notation "Paid Under Protest - All Rights Reserved" on the front and back of the check.*

3. Petitioner, by letter dated July 23, 1984, to Philip R. Michael, then Commissioner of Finance, asserted that the real property transfer tax levied and paid as a result of its purchase of the Assay Building was unconstitutionally collected and requested that the said amount be refunded with interest computed from the date of payment.

4. In a letter to the petitioner, dated September 10, 1984, the Department of Finance denied petitioner's refund request.

5. At the July 20, 1983 auction held by the United States Government to sell its property located at 32 Old Slip, in the lower Manhattan portion of New York City's financial district, petitioner had submitted the successful $27,010,000.00 bid for the Assay Building.**

6. Larry Jay Wyman, currently senior project director and vice president of H R O International Ltd., testified that it was petitioner's intention in acquiring the Assay Building to demolish the building on the site and to construct thereon a new 1,000,000 square feet office building at a total projected cost of

---

*Simultaneously therewith, the grantee also paid a New York State Real Estate Transfer Tax of $108,040.00 by separate check.

**At the auction, H R O International, Ltd. acted as the nominee for one of the prospective partners (Mazal American Partners) of a partnership to be subsequently formed, namely Assay Partners.

$250,000,000.00, including land. According to Mr. Wyman, the total projected cost included, in addition to the $27,000,000.00 cost of the land, projected construction costs of approximately $100,000,000.00, projected demolition costs of approximately $2,500,000.00, and projected rental brokerage commissions of between $5,000,000.00 and $10,000,000.00. Mr. Wyman did not account for any other projected costs, except for a built-in reserve for contingencies of between $3,000,000.00 and $5,000,000.00.

7. Mr. Wyman further testified that although the petitioner was aware of the real property transfer tax, it believed that the transaction would be exempt from that tax because the United States Government was the grantor. He further stated that if the petitioner had known that the real property transfer tax would be assessed, it would have taken that additional cost into account in its calculation of the relative value of the property and the price it was willing to pay for it. It was not until shortly before the transfer of title to the Assay Building that the petitioner became aware that the real property transfer tax was applicable and that the deed could not be recorded without payment of that tax.

8. Petitioner contends that the real property transfer tax discriminates against grantees of the United States Government, such as petitioner, by imposing that tax on them, but not imposing it on grantees of certain other exempt organizations set forth in section 11-2106.b (formerly section II46-6.0.b) of the Administrative Code of the City of New York. According to the petitioner, such discrimination violates the Supremacy Clause of the United States Constitution, in that it treats grantees of other entities better than grantees of the United States Government.

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9. The Supremacy Clause, Article VI, clause 2 of the United States Constitution, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

CONCLUSIONS OF LAW

A. That pursuant to section 11-2102.a (formerly section II46-2.0.a) of the Administrative Code of the City of New York (hereinafter referred to as the "Administrative Code"), the real property transfer tax is imposed on each deed at the time of delivery by a grantor to a grantee where the consideration for the real property and any improvements thereon exceeds twenty-five thousand dollars.

B. That section 11-2104 (formerly section II46-4.0) of the Administrative Code provides, in pertinent part:

> "The tax imposed hereunder shall be paid by the grantor....before the recording of such deed.... The grantee shall also be liable for the payment of such tax in the event that... the grantor is exempt from tax."

Appendix E

C. That section 11-2106.a (formerly section II46-6.0.a) of the Administrative Code, which exempts certain entities from paying the real property transfer tax, provides:

> The following shall be exempt from the payment of the tax imposed by this chapter and from filing a return:
>
> 1. The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada) or political subdivisions;
>
> 2. The United States of America, and any of its agencies and instrumentalities, insofar, as they are immune from taxation, *provided, however, that the exemption of such governmental bodies or persons shall not relieve a grantee from them of liability for the tax or from filing a return* (emphasis supplied).

D. That section 11-2106.b of the Administrative Code, which exempts certain deeds from the real property transfer tax, provides in pertinent part:

> The tax imposed by this chapter shall not apply to any of the following deeds:

Appendix E

> 1. A deed by or to the United Nations or other world-wide international organizations of which the United States of America is a member.
>
> 2. A deed by or to any corporation, or association, or trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals....

E. That, pursuant to section 11-2106.a of the Administrative Code, the grantee must pay the real property transfer tax on a deed transferring property from the United States Government to private parties.

F. That the deed in question is not a deed exempted from the real property transfer tax, pursuant to section 11-2106.b of the Administrative Code.

G. That an administrative agency such as the Bureau of Hearings of the Department of Finance is not authorized to rule on constitutional issues. *Finnerty v. Cowen*, 508 F.2d 979, 982 (1974). Therefore, petitioner's claim that the real property transfer tax unconstitutionally discriminates against grantees of the United States Government cannot be resolved in this proceeding.

Appendix E

H. That the petition made by Assay Partners for refund of real property transfer tax is denied.

DATED: NEW YORK, NEW YORK
October 29, 1987

s/Abraham Biderman
Abraham Biderman
Commissioner of Finance

This decision was rendered without the participation of Arthur S. Katz, currently Director of the Bureau of Hearings.

APPENDIX F — LETTER FROM COMMISSIONER OF FINANCE TO ASSAY PARTNERS DATED SEPTEMBER 10, 1984, DENYING CLAIM FOR REFUND OF TRANSFER TAX PAID

/LOGO/
FINANCE
Philip R. Michael
Commissioner of Finance
Maria T. Jones,
Deputy Commissioner

The City of New York
Department of Finance
Office of Legal Affairs
225 Broadway, New York
Telephone 566-8934

September 10, 1984

Mr. Jonathan L. Mechanic
Assay Partners
c/o HRO International, Ltd.
Tower 56
126 East 56th Street - 30th Floor
New York, N.Y. 10022

RE: Real Property Transfer Tax Refund Request

Dear Mr. Mechanic:

Your July 23, 1984 request for refund of real property transfer tax paid in connection with the purchase of a building from the United States Government has been referred to this office for reply. Please be advised that based upon the reasons set forth below, your refund request is denied.

Appendix F

On November 1, 1983, Assay Partners purchased the Assay Building located at 32 Old Slip from the United States Government. As the grantee of this transfer, Assay paid, on November 1, 1983, a New York City Real Property Transfer Tax of $540,200.00. You believe that the imposition of the transfer tax on this transfer is unconstitutional because it is in violation of the Supremacy Clause of the United States Constitution.

You cite the U.S. Supreme Court cases of *United States v. City of Detroit*, 355 US 466 (1958) and *Washington v. United States*, ___ US ___, 75 L.Ed.2d 264 (1983) to the effect that a tax may be invalid if it discriminates against the United States government or those with whom it deals, as for example, when it "treats someone else better than it treats them." *Washington* at 272 (L. Ed.2d). You note that grantees of certain exempt organizations, such as the United Nations, worldwide international organizations of which the United States is a member, and charitable, religious or educational organizations, are not required to pay the transfer tax. Thus, you conclude it is improper to require grantees of the Federal Government to pay the transfer tax. This treats grantees, for example, of the United Nations, better than grantees of the Federal Government. This, you submit, is a violation of the Supremacy Clause under the *Washington* case, *supra*.

Section II46-6.0.a.2 of Chapter 46 of the New York City Administrative Code provides:

> "a. The following shall be exempt from the payment of the tax imposed by this title and from filing a return:

Appendix F

> 2. The United States of America, and any of its agencies and instrumentalities, insofar as they are immune from taxation, provided, however, that the exemption of such governmental bodies or persons shall not relieve a grantee from them of liability for the tax or from filing a return.

Section II46-4.0 of the Administrative Code provides, in pertinent part:

> "The tax imposed hereunder shall be paid by the grantor ... before the recording of such deed. The grantee shall also be liable for the payment of such tax in the event that ... the grantor is exempt from tax.

Thus, the grantee must pay the tax on a deed transferring property from the Federal Government to private parties. The constitutionality of these provisions was specifically affirmed in *Matter of Eight Sherwood Corp. v. City of New York*, 67 Misc.2d 246 (Sup. Ct., New York County, 1969) and again in *Lawrence Towers Associates v. City of New York*, 67 Misc.2d 217 (Sup. Ct., New York County, 1971).

A different result is not warranted under the *Washington* and *Detroit* cases, *supra*. In *Washington* a special State sales tax was specifically imposed on building contractors dealing with the Federal Government. This was in lieu of the general sales tax imposed on landowners who purchase the completed construction project. In upholding the tax, the Court rejected the United States'

argument that different treatment of Federal contractors from other contractors invalidates the tax. Rather, the Court held that Federal tax immunity is violated only if the Federal Government, or those who deal with it, must carry a heavier tax burden than others.

The City's Real Property Transfer Tax has not singled out a Federal grantor and its grantee for a heavier tax burden than other grantors and grantees. As the *Washington* court stated "The Washington statute is no different from any other taxing scheme that switches the incidence of the tax from one party to a transaction to another when the party that would ordinarily be taxed is immune." *Washington* at 271 n.9 (L. Ed.2d). This is true of the City's transfer tax also.

This is not the situation of a tax specifically imposed against those who do business with the Federal government. The exceptional situations wherein grantees of, for example, charitable organizations are not subject to the tax does not change this tax of general application to a tax which discriminates against the Federal Government.

Appendix F

Accordingly, your refund request is denied. We will instruct our Non-Corporate Refunds Unit to issue the formal denial notice so that you may perfect a timely appeal, if you so wish.

Very truly yours,
s/Maria T. Jones
Maria T. Jones
Deputy Commissioner for Legal Affairs

ASK:pw
cc: Non-Corporate Refunds Unit

APPENDIX G — LETTER (WITHOUT EXHIBITS) FROM ASSAY PARTNERS TO COMMISSIONER OF FINANCE DATED JULY 23, 1984, CLAIMING REFUND OF TRANSFER TAX PAID

ASSAY PARTNERS
c/o HRO International, Ltd.
Tower 56
126 East 56th Street, 30th Floor
New York, New York 10022

July 23, 1984

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Philip R. Michael
Commissioner of Finance
New York City Department of Finance
500 Municipal Building
New York, New York 10007

Dear Mr. Michael:

On November 1, 1983, Assay Partners ("AP") purchased a building located at 32 Old Slip ("Assay Building") from the United States Government. Thereafter, also on November 1, 1983, within one year of the date of this letter, AP paid, as the grantee, the sum of $540,200.00 in accordance with the New York City Real Property Transfer Tax ("Transfer Tax"). Enclosed is a photostated copy of the check with which AP paid said Transfer Tax.

Appendix G

It is AP's position that the Transfer Tax levied and paid as a result of its purchase of the Assay Building was unconstitutionally collected, and should be refunded with interest. Specifically, the Transfer Tax unconstitutionally discriminates against grantees of the United States by imposing the Transfer Tax on them, while not imposing it on grantees of other exempt entities such as: (1) "the United Nations or other world-wide international organizations of which the United States of America is a member"; and (2) with certain limitations, "any corporation, or association, or trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals." *See* N.Y.C. Adm. Code Sec. II46-6.0, subds. a, par. 2, b, pars. 1, 2; Reg. Art. 15, subds. a, par. 2, b, pars. 1, 2.

AP's conclusion that the Transfer Tax is unconstitutional is based on the United States Supreme Court's interpretation of the Supremacy Clause, Art. VI, cl.2, of the United States Constitution, dating back to the landmark case of *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (1819). In *M'Culloch*, the Court enunciated the principle that the property, functions, and instrumentalities of the Federal Government are immune from taxation by its constituent parts. An established corollary of this basic principle is that "a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government *or those with whom it deals*." *United States v. City of Detroit*, 355 U.S. 466, 473, 78 S.Ct. 474, 478, 2 L.Ed.2d 424, 429 (1958) (emphasis added). The Court, in its most recent decision on point, has further refined its position: "[t]he State does not discriminate against the Federal Government and those with

whom it deals unless it *treats someone else better than it treats them.*" *Washington v. United States*, ___ U.S. ___, ___, 103 S.Ct. 1344, 1350, 75 L.Ed.2d 264, 272 (1983) (emphasis added).

Clearly, the Transfer Tax treats grantees from numerous entities "better" than it treats grantees from the United States. AP, therefore, asserts that the Transfer Tax is unconstitutional, and respectfully requests that the amount assessed and paid by it, plus interest computed from the date of payment, be refunded.

Sincerely yours,

ASSAY PARTNERS
By: Mazal American Partners
By: Manteca Realty
Corporation, N.V.

By: s/Jonathan L. Mechanic
Jonathan L. Mechanic,
Its Attorney-In-Fact

bcc: Norman Sinrich, Esq.
JLM:krg
LTR12/321
Enclosure

APPENDIX H — PETITION FOR HEARING BEFORE THE CITY OF NEW YORK DEPARTMENT OF FINANCE DATED OCTOBER 10, 1984

Taxpayer's Name:	Assay Partners c/o HRO International, Ltd.
Tel. Number:	212/371-8550
Employee Identification Number:	13-3212012
Address:	126 East 56th Street New York, New York 10022
Taxpayer's Representative:	Norman Sinrich
Tel. Number:	212/541-5800
Address:	30 Rockefeller Plaza New York, New York 10112
Audit Number:	Unknown
Case Number:	Unknown
Type of Tax:	New York City Real Property Transfer Tax

I Norman Sinrich the representative named above hereby petition for a hearing on the following matter:

Appendix H

A refund of $540,200 is requested. The attached Letter is dated September 10, 1984.
[Exhibit attached at preceding pages 30a-34a]

State ground(s) for filing this Petition:

See attached letter dated July 23, 1984 from Jonathan L. Mechanic to Philip R. Michael, Commissioner of Finance of The City of New York.
[Exhibit attached at preceding pages 35a-37a]

s/Norman Sinrich
Norman Sinrich
Representative

October 10, 1984

APPENDIX I — EXCERPTS FROM MINUTES OF HEARING BEFORE THE CITY OF NEW YORK DEPARTMENT OF FINANCE HELD ON OCTOBER 21, 1985

DEPARTMENT OF FINANCE — HEARING BUREAU
October 21, 1985 — 10:25 A.M.

In the Matter of:
ASSAY PARTNERS
c/o HRO INTERNATIONAL LTD.
126 East 56th Street
New York, New York 10022

CLAIM NO. 84-9189
E.I. NO. 13-3212012

Real Property Transfer Tax

BEFORE: Stanley Nosol, Formal Referee

FOR THE DEPARTMENT OF FINANCE: Arthur Katz, Esq., Tax Counsel

FOR THE TAXPAYER: Chadbourne, Parke, Whiteside & Wolff, Esqs., 30 Rockefeller Plaza, New York, New York 10020

BY: Norman Sinrich, Esq. and Lawrence E. Savell, Esq.

Deborah De Angelis, Hearing Reporter

Appendix I

* * *

THE REFEREE: Mr. Sinrich, would you like to make your opening statement at this time setting forth the Taxpayer's position?

MR. SINRICH: I would.

THE REFEREE: I note again that it has no evidentiary value but purely for the purpose of defining the issues that you wish to have reviewed.

MR. SINRICH: Thank you. Your Honor, my name is Norman Sinrich. I am here on behalf of the petitioning Taxpayer, Assay Partners, whom I shall refer to here as Taxpayer.

On November 1, 1983, Taxpayer purchased from the federal government the property building located at 32 Old Slip in New York City, which I shall refer to as the Assay building. On that same day, Taxpayer, as the grantee, paid under protest and with all rights reserved the sum of $540,200 in accordance with the provisions of the New York City real property tax. It is Taxpayer's position that the transfer tax levied and paid in connection with the Taxpayer's purchase of the Assay building was unconstitutionally collected and should be refunded with interest, specifically certain provisions of the transfer tax unconstitutionally discriminate against grantees of the United States, of which Taxpayer is one, by imposing the transfer tax on them while not imposing it on grantees of certain other exempt entities. This is in direct contravention of the supremacy clause found in Article Roman 6, sub-clause 2 of the Constitution of the United States, which provision cars treating grantees of other entities better than grantees of the federal government. If I may, your Honor, I will begin this morning by

briefly highlighting the salient provisions of the transfer tax involved in this dispute, which I respectfully request your Honor take judicial notice.

THE REFEREE: Certainly.

MR. SINRICH: I will then call to the stand a representative of Taxpayer who was personally involved in the transaction and who will testify to the operative facts. Following the submission of evidence, I will, with your Honor's permission, address the constitutional issue involved reserving the right to submit a written legal memorandum as well on that point.

Regarding the New York City real property transfer tax, ordinarily this tax is imposed on the grantor of a deed. The statute, however, exempts certain grantors from payment of this tax. These include the State of New York and its political subdivisions and the United States of America. Nevertheless the statute imposes a tax on the grantees of deeds delivered by these exempt entities. Yet a further exemption is found in the statute. This exemption applies to both grantors and grantees if either is the United Nations or one of the arms of the United Nations or an educational, religious charitable organization or similar non-profit organization. This further exemption is not available to grantees of the United of America. For example, when the Taxpayer here purchased the Assay building from the United States, the statute exacted a tax from the Taxpayer, even though the grantor was exempt from the tax, it being the United States.

However, recently when Columbia University sold the land under Rockefeller Center in New York City to a private profit-making entity neither the University as grantor nor the purchaser, a private profit-making entity, paid a transfer tax to the City. As noted, this discrimination provided by the statute against those who deal with the federal government violates the supremacy clause of the Constitution.

Thank you, your Honor.

* * *

Q. Am I correct, Mr. Wyman, that in connection with this transaction that among the costs that you did not take into account was a New York City real property trasfer tax because you did not believe it would apply to the transaction.

MR. KATZ: I object to that as leading the witness and speculation.

MR. SINRICH: Speculation, your Honor?

THE REFEREE: I don't think it's speculation.

MR. KATZ: You are asking him to make a conclusion, asking him if your conclusion is right. You are asking him to speculate on your conclusion.

MR. SINRICH: I am not. I am asking him if it's a fact that he took into account the tax did not apply.

THE REFEREE: Off the record.

(Discussion held off the record.)

Q. Mr. Wyman, did you think the New York City real property transfer tax would apply to this transaction?

THE REFEREE: You can answer.

A. No, we did not.

Q. Why did you not believe it would apply to the transaction.

A. It was our understanding that because the grantor was the United States government that the transaction itself would be exempt.

Q. Would the Taxpayer's evaluation of the property, the Assay building, differ it had been knwon that the City would apply a transfer tax to the transaction?

MR. KATZ: That calls for speculation.

MR. SINRICH: He has testified that he participated in the discussions and consideration of factors that led to the conclusion to seek to purchase this property. Certainly he has testified the taxes are a factor.

THE REFEREE: I will allow the question. That would be a relevant element in determining bidding price for the building.

A. Had we known the taxes were to be payable, yes, given the size of the tax here it certainly would have contributed to our analysis of what the property was worth. Because that would have been a cost of completing the finished office building.

Q. Based on your experience with this transaction, Mr. Wyman, has the knowledge that the City applies or seeks to apply a transfer tax to purchases from the United States cause Taxpayer to change the way Taxpayer evaluates property offered for sale by the federal government and the amount that Taxpayer would pay for such property. We would certainly have to take into consideration the tax next time and factor into the purchase price we might be wiliing to pay the amount of the tax payable.

Q. Based on your experience, Mr. Wyman, given a choice between two identical parcels of land, the only difference being that one is offered for sale by the federal government and the other is being sold by, Say, Columbia University, which of the two parcels would Taxpayer choose to purchase and why?

MR. KATZ: This is speculation now. It's a hypothetical situation that has not been shown to exist.

MR. SINRICH: Not so at all. I have asked Mr. Wyman to testify as to what his experience has led him and the Taxpayer to conclude in relation to proposed purchases of property in New York City.

MR. KATZ: Mr. Wyman is not an expert witness. He is here to testify to this transfer —

MR. SINRICH: I asked him to testify on his experience, not as an expert.

MR. KATZ: That is —

THE REFEREE: We are quibbling over the obvious. I will allow the question. It's quite obvious that there are economic ramifications depending on who the grantor is.

A. To the extent that one parcel would be less expensive to develop because there was no payment of tax, we would choose to proceed with the parcel that did not have tax as part of its transactional cost.

APPENDIX J — VERIFIED PETITION (WITHOUT EXHIBITS) TO THE STATE OF NEW YORK SUPREME COURT, COUNTY OF NEW YORK DATED FEBRUARY 29, 1988

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of
ASSAY PARTNERS,

Petitioner,

For a Judgment pursuant to CPLR Article 78, or in the alternative, for a Declaratory Judgment, or for such other Judgment and relief as is specified herein,

-against-

CITY OF NEW YORK, DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK,
and ABRAHAM BIDERMAN as Commissioner,

Respondents.

VERIFIED PETITION, OR IN THE ALTERNATIVE, COMPLAINT FOR ACTION FOR DECLARATORY JUDGMENT OR FOR SUCH OTHER JUDGMENT AND RELIEF AS IS SPECIFIED HEREIN

Index No. _____

Appendix J

Petitioner Assay Partners ("Assay"), by its attorneys, Chadbourne & Parke, complaining of respondents City of New York (the "City"), Department of Finance of the City of New York (the "Department"), and Abraham Biderman as Commissioner, alleges:

INTRODUCTORY STATEMENT

This proceeding is brought to challenge respondents' imposition on Assay of New York City Real Property Transfer Tax (the "Transfer Tax") in the amount of $540,200, respondents' collection of the Transfer Tax from Assay and respondents' denial of Assay's request for refund of the Transfer Tax so paid and collected. The request relates to the November 1, 1983 sale by the United States Government to Assay of a building located at 32 Old Slip, New York, New York (the "Assay Building"). Under the Transfer Tax, Assay, as the grantee of the United States, was required to pay tax in respect of this sale in the amount of $540,200. Assay did so, under protest, on November 1, 1983.

Assay asserts that the imposition of the Transfer Tax on the sale of the Assay Building to it by the United States is unconstitutional. The constitutional defect is discrimination against the United States and against grantees of the United States (such as Assay). Specifically, although the United States is a member of a group of entities that are themselves exempt from the Transfer Tax, grantees of the United States, like Assay, are subject to the Transfer Tax, whereas grantees of some other members of the exempt entity group (such as grantees of international organizations, charities and schools) are not subject to the Transfer Tax.

Appendix J

THE NEW YORK CITY REAL PROPERTY TRANSFER TAX IS UNCONSTITUTIONAL, AND RESPONDENTS' IMPOSITION AND COLLECTION OF TRANSFER TAX ON ASSAY'S PURCHASE OF REALTY FROM THE UNITED STATES GOVERNMENT AND RESPONDENTS' DENIAL OF ASSAY'S REFUND REQUEST WERE UNLAWFUL AND IMPROPER, IN VIOLATION OF LAWFUL PROCEDURE, BASED ON AN ERROR OF LAW, ARBITRARY AND CAPRICIOUS, CONSTITUTED AN ABUSE OF DISCRETION AND ACTS IN EXCESS OF JURISDICTION, AND WERE UNSUPPORTED BY SUBSTANTIAL EVIDENCE

1. This proceeding is brought for a judgment pursuant to CPLR § 7803, or, in the alternative, for a declaratory judgment pursuant to CPLR § 3001 *et seq.*, for a judgment for moneys had and received or for such other judgment and relief as is specified herein.

2. Assay is a partnership duly created under the laws of the State of New York in 1983, with its principal place of business at 126 East 56th Street, New York, New York. Assay owns, operates and manages a commercial building located at 32 Old Slip, New York, New York.

3. Upon information and belief, at all times hereinafter mentioned, respondent City was a sovereign entity, respondent Department was a department of the City with offices at the Municipal Building, One Centre Street, New York, New York, and

respondent Abraham Biderman (or his predecessor, Philip R. Michael) was the Commissioner of the Department.

The Transfer Tax

4. The Transfer Tax is imposed at the time of delivery of a deed that conveys any real property (or interest therein) located in whole or in part within the City, provided the consideration for the conveyance exceeds $25,000. N.Y.C. Admin. Code ("Code") Sec. 11-2101, -2102 (formerly II46-1.0, -2.0) (Decision of the Department dated October 29, 1987 ("D") at 5). Ordinarily, the Transfer Tax is imposed upon and required to be paid by the grantor. "The grantee shall also be liable for the payment of such tax," however, "in the event that . . . the grantor is exempt from tax." Code Sec. 11-2104 (formerly II46-4.0) (D-5).

5. The Transfer Tax exempts certain entities from the tax. It provides:

> "The following shall be exempt from the payment of the tax imposed by this chapter and from filing a return:
>
> > "1. The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada) or political subdivisions;

Appendix J

"2. The United States of America, and any of its agencies and instrumentalities, insofar as they are immune from taxation . . . ."

Code Sec. 11-2106.a (formerly II46-6.0.a) (D-6). *See also* Transfer Tax Regulations ("Reg.") Art. 15.a.

6. The exemption of the United States from the Transfer Tax as provided in Code Sec. 11-2106 (formerly II46-6.0), *supra*, does not extend to its grantees (D-7). To the contrary, Code Sec. 11-2106.a.2 (formerly II456-6.0.a.2) specifically provides that:

"the exemption of [the United States] shall *not* relieve a grantee from [it] of liability for the tax or from filing a return." (Emphasis added.)

7. In addition to the United States, other entities are also exempt from the Transfer Tax. However, the Transfer Tax provides this additional exemption by exempting certain deeds from the Tax. Code Sec. 11-2106.b (formerly II46-6.0.b) (D-6) provides in pertinent part as follows:

"The tax imposed by this title shall not apply to any of the following deeds:

"1. A deed by or to the United Nations or other world-wide international organizations of which the United States of America is a member;

> "2. A deed by or to any corporation, or association, or trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals . . . ."

8. The exemption of various entities from the Transfer Tax as provided in Code Sec. 11-2106.b (formerly II46-6.0.b), *supra*, extends to any and all of their grantees. *Id;* Reg. Art. 15.b ("Since the tax does not apply to any [exempt] deed . . . neither the grantor nor the grantee is required to pay the tax.") Thus, the Transfer Tax is never imposed on grantees of the United Nations, grantees of other world-wide international organizations of which the United States is a member and grantees of certain corporations, associations, trusts, community chests, funds or foundations operated for religious, charitable or educational purposes (D-7). The deed exemption set forth in Code Sec. 11-2106.b (formerly II46-6.0.b) does not apply to the United States or to its grantees like Assay (D-7).

9. Accordingly, although the Transfer Tax defines a group of grantors that is exempt from the Transfer Tax, the identity of the grantor determines whether the grantee is subject to the Tax. Grantees of the United Nations and educational, charitable and other like institutions are exempt from the Transfer Tax (D-6). Grantees of the United States, like Assay, are not. They are treated

worse. Grantees of the United States, like Assay, are required to pay Transfer Tax (D-7).*

The Purchase of the Property

10. On July 20, 1983, the United States government held an auction to sell the Assay Building. The Assay Building is situated in a prime location in the Lower Manhattan portion of the City's business district. (Transcript ("T") of Hearing (the "Hearing") held October 21, 1985 before Formal Referee/Hearing Officer Stanley Nosol ("Hearing Officer Nosol") and attended by Assay and the Department (T-31, -89)).

11. The federal government had announced the auction some time earlier. In considering whether to bid on the Assay Building, and, if so, how much to bid, Assay studied and assessed all the various factors that entered into its total cost to acquire the site, including consideration of the increase in cost that would result from any tax due as a result of the transaction (T-34-35). Although Assay was aware of the Transfer Tax, it thought the transaction would be exempt from this tax because the United States was the grantor (T-35, -37) (D-4). Accordingly, Assay did not consider the Transfer Tax as a factor entering into its calculation of the relative value of the property and the price it was willing to pay therefor. Had Assay known that the Transfer Tax would be imposed on the

---

*By comparison, New York State's Real Estate Transfer Tax, enacted three years after the Transfer Tax, treats grantees of the federal government the same as it treats grantees of the United Nations, charitable, educational and like institutions. *See* N.Y. Tax Law §§ 1404-05 (McKinney 1987).

transaction, it would have considered the Transfer Tax as an additional expense in these calculations (T-37-38) (D-4).

12. At the July 20, 1983 auction, Assay, by its nominee, submitted the successful $27,010,000 bid for the Assay Building (T-31) (D-3). Attached hereto as Exhibit "A" is a copy of the "Certificate of Corporate Bidder" and "Bid for Purchase of Government Property," which were prepared on behalf of Assay, by its nominee, the day before the auction and submitted immediately following the auction to the federal auctioneer (T-32).

13. Several months after the auction was held, Assay learned that the Transfer Tax was going to be imposed on the transfer of the Assay Building to it, and that the deed would not be recorded without payment of the tax (T-50) (D-4).

14. Assay's current knowledge that the City seeks to impose the Transfer Tax on transfers of real property by the United States, as grantor, will cause Assay to take into consideration such additional cost in its determination of the price it would be willing to pay for any property acquired from the United States in the future (T-38, -68). To illustrate, if Assay had to choose between two equivalent parcels of land offered at the same price, the only difference being that one parcel is offered for sale by the federal government and the other parcel is offered for sale, for example, by the United Nations or Columbia University (which in fact recently sold the land under Rockefeller Center to a private profit-making entity for over $800,000,000), it would naturally select the parcel that was not burdened with the added transactional cost of the Transfer Tax (T-38-39).

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15. On November 1, 1983, the date of the closing, Assay acquired title to the Assay Building. On that date, the United States, as grantor, conveyed the Assay Building to Assay, as grantee, by delivery of an Indenture (deed) dated October 31, 1983 (T-9, -34, -40) (D-2). A copy of the Indenture is attached hereto as Exhibit "B."

16. On November 1, 1983, Assay, as purchaser/grantee, filed a Transfer Tax Return dated November 1, 1983 and paid to the City, under protest, tax in the amount of $540,200 as required by the Transfer Tax (T-41, -42). Attached hereto as Exhibit "C" is a copy of the cashier's check which Assay delivered to the City in payment of the tax. The check as delivered bore the notation "Paid Under Protest -- All Rights Reserved" (T-41, -45, -50) (D-2). Attached hereto as Exhibit "D" is a copy of the Transfer Tax Return filed by Assay. The Return as filed bore the notation "being paid under protest, all rights reserved" (D-2).

Proceedings to Date

17. The Transfer Tax and the Regulations thereunder expressly provide that "the commissioner of finance shall refund or credit... any tax, penalty or interest erroneously, illegally or *unconstitutionally* collected or paid if application to the commissioner of finance for such refund shall be made within one year from the payment thereof." Code Sec. 11-2108.a (formerly 1146-8.0.a) (emphasis added); Reg. Art. 22.

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18. On July 23, 1984, Assay, in a letter to Mr. Philip R. Michael, Commissioner of Finance, asserted that the Transfer Tax collected and paid as a result of its purchase of the Assay Building was unconstitutionally imposed, and respectfully requested a refund of that amount, together with interest computed from the date of payment (D-3). Attached hereto as Exhibit "E" is a copy of Assay's July 23, 1984 claim for refund.

19. The Department has conceded the Assay's July 23, 1984 claim for refund was timely filed (T-12).

20. In a letter to Assay dated September 10, 1984 from Maria T. Jones, Deputy Commissioner, the Department denied Assay's request for a refund (D-3). Attached hereto as Exhibit "F" is a copy of the September 10, 1984 letter. Although that letter indicated that the Department "will instruct our Non-Corporate Refunds Unit to issue the formal denial notice so that [Assay] may perfect a timely appeal," no such formal notice was ever issued.

21. On October 10, 1984, Assay filed a Petition for Hearing with the Department. The Hearing was held on October 21, 1985. Attached hereto as Exhibit "G" is a copy of Assay's petition and attached hereto as Exhibit "H" is a copy of the transcript of the Hearing.

22. At the Hearing, the Department conceded the jurisdiction of the Department's Bureau of Hearings to hold the Hearing (T-3) and argued the constitutionality of the Transfer Tax. The Department also conceded that it enforces the provisions of the Transfer Tax and the Regulations thereunder in accordance with the

literal language contained therein (T-18). Attached hereto as Exhibit "I" is a copy of Assay's Post-Hearing Brief dated December 22, 1985 and attached hereto as Exhibit "J" is a copy of Assay's Reply Brief dated January 9, 1986.

23. In clear violation of Rule 14 of the Rules of Practice and Procedure in Proceedings Before the Commissioner of Finance (the "Rules"), which prohibits any *ex parte* communication with respect to the merits of a pending case between a party and the Hearing Officer, the Department sent a letter dated January 31, 1986 to Hearing Officer Nosol specifically addressing the merits of this pending case. By letter dated February 21, 1986, Assay objected to the Department's *ex parte* communication and submission after conclusion of the agreed-upon post-hearing submission period and otherwise refuted claims made by the Department's letter. Attached hereto as Exhibit "K" is a copy of Assay's February 21, 1986 letter.

24. More than two years after the Hearing, in a "Final Determination" and "Decision" dated October 29, 1987, the Department, by Abraham Biderman, Commissioner of Finance, denied Assay's claim for refund "[b]ased upon findings as a result of a hearing held at the Bureau of Hearings." Final Determination. Attached hereto as Exhibit "L" is a copy of the "Final Determination" and "Decision." The Decision indicated that Arthur S. Katz, who represented the Department at the Hearing, currently is Director of the Bureau of Hearings but did not take part in the Decision (D-7).

25. With respect to Assay's constitutional claims, the Decision set forth the Department's conclusion of law that it lacked authority to rule on the constitutional issues presented. Having disposed of Assay's constitutional claims on these grounds, the Decision proceeded to deny Assay's claim for refund based on the literal language of the Transfer Tax (Code Sec. 11-2106 (formerly 1146-6.0)) which imposes the tax on grantees of the United States (D-7).

26. As set forth in the accompanying memorandum of law, discriminatory taxation of the United States and its grantees violates the Supremacy Clause (Art. VI, cl. 2) of the United States Constitution. Under that Clause, it is axiomatic that the property, functions, and instrumentalities of the United States are immune from taxation by the states and their political subdivisions. This guiding principle precludes not only direct taxation, but veiled forms of taxation as well. Thus, the United States Supreme Court and the New York Court of Appeals has recognized that a tax is invalid under the Supremacy Clause even though it does not fall directly on the United States if it operates so as to discriminate against the Government *or those with whom it deals*. For these purposes, a tax discriminates against the United States and those with whom it deals if the tax treats someone else better that it treats them.

27. The Transfer Tax treats someone else better than it treats the United States and those with whom it deals, since the Tax is imposed on grantees of the United States but is not imposed on grantees of certain other exempt entities. If Assay had purchased the Assay Building from an international organization such as the

United Nations, the Transfer Tax would not have applied; because Assay in fact purchased the Assay Building from the United States, the Transfer Tax does apply. Under the standards enumerated by the United States Supreme Court and the New York Court of Appeals, the Transfer Tax thus is unconstitutional with regard to the United States and its grantees, such as Assay, because it treats grantees of the United States worse than it treats grantees of other entities.

28. Consequently, respondents' imposition of the Transfer Tax on Assay, respondents' collection of Transfer Tax from Assay and respondents' denial of Assay's refund request were unconstitutional, unlawful and improper, in violation of lawful procedure, based on an error of law, arbitrary and capricious, constituted an abuse of discretion and acts in excess of jurisdiction, and were unsupported by substantial evidence.

WHEREFORE, Assay respectfully demands that a judgement be entered against the respondents (whether in the form of a judgment pursuant to CPLR Article 78 or a declaratory judgment pursuant to CPLR § 3001 *et seq.* or a judgment for moneys had and received or for such other judgment and further relief as the court deems just and proper:

1. Adjudging and declaring that the actions of respondents in imposing the Transfer Tax on Assay, in collecting Transfer Tax from Assay and in denying Assay's refund request were unconstitutional, unlawful and improper, in violation of lawful procedure, based on an error of law, arbitrary and capricious,

constituted an abuse of discretion and acts in excess of jurisdiction and were unsupported by substantial evidence.

2. Refunding or directing respondents to refund the amount of Transfer Tax paid by Assay, together with interest thereon computed from November 1, 1983, the date Assay paid the unconstitutional tax, and together with the costs and disbursements of this proceeding.

3. Granting Assay such other and further relief as the Court deems just and proper.

Dated: New York, New York
February 29, 1988

CHADBOURNE & PARKE
Attorneys for Petitioner
30 Rockefeller Plaza
New York, New York 10112
(212) 408-5100

Appendix J

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FRANK V. WARD, being duly sworn, deposes and says that he is the Vice-President of Gezint Corp., a general partner of Mazal American Partners, which, in turn, is a general partner of Petitioner, Assay Partners; that he has read the foregoing Petition; and that the same is true to the best of his knowledge, information and belief.

I declare under penalty of perjury under the laws of the State of New York that the foregoing is true and correct.

/s/ Frank V. Ward
Frank V. Ward

Sworn to before me this
29th day of February, 1988.

/s/ William L. Bellotti
Notary Public
SEAL

APPENDIX K — EXCERPTS FROM BRIEF FILED IN THE APPELLATE DIVISION

To be argued by: Norman Sinrich
Time requested for argument: 15 minutes

(New York County Clerk's Index No. 4166/88)

NEW YORK SUPREME COURT
APPELLATE DIVISION - FIRST DEPARTMENT

In the Matter of the Application of
ASSAY PARTNERS,

Petitioner,

For a Judgment pursuant to CPLR Article 78, or, in the alternative, for a Declaratory Judgment, or for such other Judgment and relief as is specified herein,

-against-

CITY OF NEW YORK, DEPARTMENT OF FINANCE
OF THE CITY OF NEW YORK,
and ABRAHAM BIDERMAN as Commissioner,

Respondents.

BRIEF FOR PETITIONER ASSAY PARTNERS

Appendix K

Norman Sinrich
Nancy W. Pierce
Chadbourne & Parke
Attorneys for Petitioner
Assay Partners
30 Rockefeller Plaza
New York, New York 10112
(212) 408-5100

Of Counsel:
Lawrence E. Savell

Appendix K

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of the Application of
ASSAY PARTNERS,

Petitioner,

For a Judgment pursuant to CPLR Article 78, or, in the alternative, for a Declaratory Judgment, or for such other Judgment and relief as is specified herein,

-against-

CITY OF NEW YORK, DEPARTMENT OF FINANCE
OF THE CITY OF NEW YORK,
and ABRAHAM BIDERMAN as Commissioner,

Respondents.

New York County Clerk's
Index No. 4166/88

PRELIMINARY STATEMENT

This proceeding was initially brought by Petitioner Assay Partners ("Assay") in the Supreme Court and was subsequently referred to the Appellate Division by Order of Justice Francis Pecora dated September 14, 1988. The action challenges

respondents' imposition on Assay of New York City Real Property Transfer Tax (the "Transfer Tax") in the amount of $540,200 and respondents' denial of Assay's request for refund of the Transfer Tax so paid. Assay seeks a judgment pursuant to New York Civil Practice Law and Rules ("CPLR") § 7803 (McKinney 1981), or, in the alternative, a declaratory judgment pursuant to CPLR § 3001 (McKinney 1974), or a judgment for moneys had and received, or such other judgment and relief as this Court deems proper.

Assay's claims relate to the sale by the United States Government to Assay of a building located at 32 Old Slip, New York, New York (the "Government Building"). The sale occurred on November 1, 1983. Under the Transfer Tax, Assay, as the grantee of the United States, was required to pay tax in respect of this sale in the amount of $540,200. Assay did so, under protest, on November 1, 1983.

Assay asserts that the imposition of the Transfer Tax on the sale of the Government Building to it by the United States is unconstitutional. The constitutional defect is discrimination against the United States and against grantees of the United States (such as Assay) in violation of the Supremacy Clause (art. VI, cl. 2) of the United States Constitution.

Both the United States Supreme Court and the New York Court of Appeals have recognized that a tax is discriminatory and, thus, invalid under the Supremacy Clause if the tax treats someone else better than it treats the United States and those with whom the United States deals. Based on these standards, the Transfer Tax violates the Supremacy Clause for two reasons. First, since the

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Transfer Tax is imposed on grantees of the United States but is not imposed on grantees of certain other exempt entities (such as, among others, international organizations), the Tax is unconstitutional on its face because it treats someone else better than it treats the United States and those with whom the United States deals. The fact is that, if Assay had purchased the Government Building from an international organization such as the United Nations, the Transfer Tax would not have applied: because Assay in fact purchased the Government Building from the United States, the Transfer Tax is imposed. Second, the Transfer Tax is unconstitutional as applied because, by "routing" conveyances of property owned by the City of New York ("City") through the Public Development Corporation (which is a tax-exempt instrumentality of the City), the City administers the Transfer Tax in a way that ensures, in practice, that grantees of the City do not pay the Transfer Tax, whereas the City imposes the tax on grantees of the United States. Thus the City unconstitutionally treats itself and its grantees better than it treats the United States and grantees of the United States.

Consequently, respondents' imposition of the Transfer Tax on Assay and respondents' denial of Assay's refund request were unconstitutional, unlawful and improper, in violation of lawful procedure, based on an error of law, arbitrary and capricious, and constituted an abuse of discretion and acts in excess of jurisdiction. Judgment must therefore be entered in Assay's favor.

Appendix K

STATEMENT OF FACTS

A. The Parties

Assay is a partnership duly created under the laws of the State of New York in 1983, with its principal place of business at 126 East 56th Street, New York, New York. Assay owns, operates and manages a commercial building located at 32 Old Slip, New York, New York.

Respondents are the City of New York (the "City"), a municipal corporation, the Department of Finance of the City of New York (the "Department"), and Abraham Biderman, the Commissioner of the Department.

B. The Transfer Tax

The Transfer Tax is imposed at the time a dead to real property located within the City is delivered, provided the consideration for the conveyance exceeds $25,000. N.Y.C. Admin. Code ("Code") § § II46-1.0, -2.0 (1984) (recodified and amended at § § 11-2101, -2102 (1986 & Supp. 1987)).* Ordinarily, the Transfer Tax is imposed upon and required to be paid by the grantor. "The grantee shall also be liable for the payment of such tax," however, "in the

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*References to Code sections and Department of Finance Real Property Transfer Tax Regulations ("Reg." or "Regulations") are to the versions of such provisions as in effect at November 1, 1983, the date of Assay's purchase of the Government Building and its payment of the Transfer Tax. Many of these provisions have been recodified and/or amended into their present forms, effective subsequent to November 1, 1983.

event that . . . the grantor is exempt from tax." Code § II46-4.0 (1984) (recodified and amended at § 11-2104 (1986 & Supp. 1987)).

The Transfer Tax exempts certain entities, including the United States, from the tax. It provides:

> "The following shall be exempt from the payment of the tax imposed by this title and from filing a return:
>
> > "1. The state of New York, or any of its agencies, instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada) or political subdivisions;
> >
> > "2. The United States of America, and any of its agencies and instrumentalities, insofar as they are immune from taxation . . . ."

Code § II46-6.0(a) (1984) (recodified at § 11-2106(a) (1986)).

The exemption of the United States from the Transfer Tax does not extend to the grantees of the United States. To the contrary, Code § II46-6.0(a)(2) (recodified at § 11-2106(a)(2)) specifically provides that:

> "the exemption of [the United States] shall *not* relieve a grantee from [the United States] of liability for the tax or from filing a return." (Emphasis added.)

Appendix K

In addition to exempting certain entities like the United States from the Transfer Tax, certain deeds are also exempt from the Tax. Code § II46-6.0(b) (1984) (recodified and amended at § 11-2106(b) (1986 & Supp. 1987)) provides in pertinent part as follows:

> "The tax imposed by this title shall not apply to any of the following deeds:
>
> > "1. a deed by or to the United Nations or other world-wide international organizations of which the United States of America is a member;
> >
> > "2. a deed by or to any corporation, or association, or trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals . . . .

The effect of the "deed" exemption provided in Code § II46-6.0(b) (recodified and amended at § 11-2106(b)), is that both the grantor *and the grantee* are exempt from the tax. *Id.*; *see* Reg. Art. 15 (b) ("Since the tax does not apply to any [exempt] deed ...neither the grantor nor the grantee is required to pay the tax."). Thus, the Transfer Tax is never imposed on grantees of the United Nations, grantees of other world-wide international organizations of which the United States is a member and grantees of certain corporations, associations, trusts, community chests, funds or foundations operated for religious, charitable or educational purposes. The deed exemption set forth in Code § II46-

6.0(b) (recodified and amended at § 11-2106(b)) does not apply to the United States or to its grantees like Assay.

Accordingly, although the Transfer Tax defines a group of grantors that is exempt from the Transfer Tax, the identity of the grantor determines whether the grantee is subject to the Tax. Grantees of the United Nations and educational, charitable and other like institutions are exempt from the Transfer Tax. Grantees of the United States, like Assay, are not. They are treated worse. Under the Transfer Tax, grantees of the United States, like Assay, are required to pay Transfer Tax.*

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*By comparison, New York State's Real Estate Transfer Tax, enacted three years after the Transfer Tax, treats grantees of the federal government the same as it treats grantees of the United Nations, charitable, educational and like institutions. *See* N.Y. Tax Law §§ 1404-05 (McKinney 1987).

APPENDIX L — NOTICE OF APPEAL DATED OCTOBER 4, 1989 AND JURISDICTIONAL STATEMENT (WITHOUT EXHIBITS) DATED OCTOBER 11, 1989 SUBMITTED TO THE STATE OF NEW YORK COURT OF APPEALS IN SUPPORT OF APPEAL AS OF RIGHT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of
ASSAY PARTNERS,

Petitioner-Appellant,

For a Judgment pursuant to CPLR Article 78, or, in the alternative, for a Declaratory Judgment, or for such other Judgment and relief as is specified herein,

-against-

CITY OF NEW YORK, DEPARTMENT OF FINANCE
OF THE CITY OF NEW YORK,
and ABRAHAM BIDERMAN as Commissioner,

Respondents-Respondents.

NOTICE OF APPEAL

Index No. 4166/88

Appendix L

PLEASE TAKE NOTICE that Petitioner-Appellant, Assay Partners, pursuant to CPLR 5601(b)1, hereby appeals as of right to the Court of Appeals of the State of New York from an order of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division on August 10, 1989, which order unanimously confirmed the determination dated October 29, 1987 of Respondent Commissioner denying Petitioner-Appellant a refund of New York City Real Property Transfer Tax, and which order finally determined this action where there is directly involved the construction of Article VI, clause 2 (the "Supremacy Clause") of the Constitution of the United States.

Appendix L

PLEASE TAKE FURTHER NOTICE that Petitioner-Appellant appeals from each and every part of said order of the Appellate Division as well as from the whole thereof.

Dated: New York, New York
October 4, 1989

/s/ Norman Sinrich
Norman Sinrich

/s/ Nancy W. Pierce
Nancy W. Pierce

Chadbourne & Parke
Attorneys for Petitioner-
Appellant Assay Partners
30 Rockefeller Plaza
New York, New York 10112
(212) 408-5100

To: Hon. Norman Goodman
County Clerk, New York County
60 Centre Street
New York, New York 10007

Peter L. Zimroth, Esq.
Corporation Counsel of
the City of New York
Attorney for Respondents-Respondents
100 Church Street
New York, New York 10007 (212) 566-3300

Appendix L

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of
ASSAY PARTNERS,

Petitioner-Appellant,

For a Judgment pursuant to CPLR Article 78, or, in the alternative, for a Declaratory Judgment, or for such other Judgment and relief as is specified herein,

-against-

CITY OF NEW YORK, DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK, and ABRAHAM BIDERMAN as Commissioner,

Respondents-Respondents.

JURISDICTIONAL STATEMENT PURSUANT TO RULE 500.2

Petitioner-Appellant Assay Partners respectfully submits the following jurisdictional statement pursuant to Rule 500.2 of the Rules of Practice of the Court of Appeals:

1. The title of the action is as stated in the caption. There has been no change of parties since the commencement of this action.

Appendix L

2. The court from which the appeal is taken is the Supreme Court, Appellate Division, First Judicial Department.

3. The notice of appeal to this Court was served and filed on October 4, 1989.

4. The order appealed from, and its notice of entry, were served by hand upon Petitioner-Appellant on September 7, 1989. The order confirms the determination dated October 29, 1987 of Abraham Biderman, as Commissioner of the Department of Finance of the City of New York, which denied Petitioner-Appellant's claim for refund of New York City Real Property Transfer Tax.

5. The name and address of the attorney for Respondents-Respondents are:

PETER L. ZIMROTH, Esq.
Corporation Counsel of
the City of New York
100 Church Street
New York, New York 10007
(212) 566-3300

6. Copies of the papers required pursuant to Rule 500.2(b) are attached hereto as follows:

Exhibit A - Notice of Appeal dated October 4, 1989

Exhibit B - Order of the Appellate Division being appealed

Appendix L

Exhibit C - Opinion of the Appellate Division

Exhibit D - Final Determination dated October 29, 1987 of Respondent Commissioner of the Department of Finance of the City of New York, and Decision of said Commissioner of even date, reviewed by the Appellate Division

7. Pursuant to CPLR 5601(b)1, this Court has jurisdiction to entertain the appeal and review the questions raised since the Appellate Division's order finally determined the action and there is directly involved a substantial question as to the construction of Article VI, clause 2 (the "Supremacy Clause") of the Constitution of the United States. As required by Rule 500.2, the following is a "point-heading identification of all issues already raised and likely to be raised," and a statement of the "constitutional, statutory, case or other authority supporting the assertion that the court has jurisdiction to entertain the appeal and to review the questions raised:"

I. Under the Supremacy Clause of the United States Constitution (Article VI, clause 2), a tax may not discriminate against the United States or those with whom the United States deals by treating someone else better than it treats them. (U.S. Const. Art. VI, cl. 2; *Phillips Chemical Co. v. Dumas Indep. School Dist.*, 361 U.S. 376, 387 *reh'g denied*, 362 U.S. 937 (1960); *Washington v. United States*, 460 U.S. 536, 544-45 (1983); *Forbes, Inc. v. Department of Fin. of New York*, 66 N.Y.2d 243, 253, 496 N.Y.S.2d 394, 400, 487 N.E.2d 251, 257

(1985), *rev'g* 102 A.D.2d 1013 (1st Dep't 1984), *cert. denied*, 475 U.S. 1109 (1986)).

II. The New York City Real Property Transfer Tax ("Transfer Tax") violates the Supremacy Clause of the United States Constitution (Article VI, clause 2) *on its face* because grantees of the United States (like Petitioner-Appellant) are subject to the Tax but grantees of international organizations and grantees of charitable and educational organizations are exempt from the Tax; in this way, the Tax treats grantees of the United States worse than grantees of international organizations and charitable organizations. (*Id.*; *see* N.Y.C. Admin. Code §§ II46-6.0 and II46-4.0 (1984), recodified and amended at §§ 11-2106 and 11-2104 (1986 and Supp. 1987)).

(a) Under the controlling principles enunciated by this Court of Appeals in *Forbes, Inc. v. Department of Fin. of New York*, 66 N.Y.2d 243, 253-254, 496 N.Y.S.2d 394, 400, 487 N.E.2d 251, 257 (1985), *rev'g* 102 A.D.2d 1013 (1st Dep't 1984), *cert denied*, 475 U.S. 1109 (1986), discrimination against the United States and those with whom the United States deals, in favor of private parties or other governmental units, violates the Supremacy Clause of the United States Constitution.

(b) *United States v. Illinois Department of Revenue*, 202 F.Supp. 757 (N.D. Ill. 1962), *aff'd per curiam* 371 U.S. 21 (1962), is no longer good law and is not controlling precedent.

Appendix L

(i) Whereas the *Illinois* case turned largely on public policy judgments, modern U.S. Supreme Court cases have pointedly concluded that public policy considerations cannot be relied on to uphold a tax that is discriminatory under the Supremacy Clause. *Davis v. Michigan Dep't of Treasury*, 57 U.S.L.W. 4349, 4392-4393 (March 28, 1989); *United States v. City of Manassas, Va.*, 830 F.2d 530, 534 (4th Cir. 1987), *aff'd*, 108 S.Ct. 1568 (1989).

(ii) Whereas the *Illinois* case also is premised on the conclusion that there was a "reasonable basis" for applying a retail sales tax to sales made to the federal government while exempting sales made to charitable and like organizations, the U.S. Supreme Court has made it plain (most recently in March of this year) that use of a "reasonable basis standard" to uphold a discriminatory tax is not applicable in Supremacy Clause cases. *Phillips*, 361 U.S. at 383-385; *Davis*, 57 U.S.L.W. at 4392. Moreover, in *Forbes, Inc. v. Department of Fin. of New York*, 66 N.Y. 2d 243, 252, 496 N.Y.S.2d 3[illegible]00, 487 N.E.2d 251, 257 (1985), this Court of Appeals has reached the same conclusion.

(iii) In addition, the *Illinois* case involved charitable and educational and like institutions: it neither involved nor considered the case of international organizations. *A fortiori*, *Illinois* does

not control and is not directly on point as far as Petitioner-Appellant's arguments dealing with international organizations are concerned.

(c) Under Supremacy Clause principles, discriminatory treatment of the United States and its grantees results when grantees of private parties are treated better than grantees of the United States. Supremacy Clause precepts are not limited to intergovernmental preferences. *See Forbes*, 66 N.Y.2d at 253-254; *Phillips*, 361 U.S. at 381; *United States v. City of Detroit*, 355 U.S. 466, 473 (1958); *Washington*, 460 U.S. 536, 541 (1983); *United States v. County of Fresno*, 429 U.S. 452, 465 (1977).

III. The Transfer Tax in any event violates the Supremacy Clause of the United States Constitution (Article VI, clause 2) *as applied* because New York City administers the Tax in a way so that those who buy real property from the City are exempt from the Tax whereas those who buy real property from the United States are subject to the Tax. (U.S. Const. Art. VI; see cases cited at Point I above).

(a) This argument is preserved for judicial review because Petitioner-Appellant recited the relevant facts and raised the argument at the administrative hearing of this matter, and at the Appellate division as well. *See, e.g.*, Record on Transfer at 114-124, 139-141, 149-150, 169-170 (note), 181 (note), 221-222; *see also Celestial Food v. N.Y. State Liquor Auth*, 99 A.D.2d 25, 27, 471 N.Y.S.2d 654, 656 (2d Dep't 1984); D. Siegal, *New York Practice* § 209 (1978).

(b) Violations of the federal supremacy doctrine that is embedded in the Supremacy Clause of the United States Constitution are actionable: there is no authority arising under the Supremacy Clause which indicates that, where a statute is administered in a way that violates the Supremacy Clause, the victim of that unconstitutional act has no legal remedy unless the victim demonstrates a pattern of discrimination consciously applied. *See M'Culloch v. Maryland*, 17 U.S. 316 (1819).

IV. Since the Transfer Tax is unconstitutional, Petitioner-Appellant is entitled to receive interest on the amount of Tax refundable to it. *Brodsky v. Murphy*, 25 N.Y.2d 518, 522, 307 N.Y.S.2d 435, 438, 255 N.E.2d 700, 702 (1969); *First Nat'l City Bank v. City of New York Fin. Admin.*, 43 A.D.2d 823, 823, 351 N.Y.S.2d 401, 402 (1st Dep't 1974), modified on other grounds, 36 N.Y.2d 87, 95, 365 N.Y.S.2d 493, 499, 324 N.E.2d 861, 865 (1975).

Appendix L

8. The certification required by Rule 500.2(e) is attached hereto as Exhibit E.

Dated: New York, New York
October 11, 1989

/s/ Norman Sinrich
Norman Sinrich

/s/ Nancy W. Pierce
Nancy W. Pierce

Chadbourne & Parke
Attorneys for Petitioner-Appellant
Assay Partners
30 Rockefeller Plaza
New York, New York 10112
(212) 408-5100

To: Clerk, New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Peter L. Zimroth
Attorney for Respondents-Respondents
Corporation Counsel of
the City of New York
100 Church Street
New York, New York 10007
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APPENDIX M — NOTICE OF MOTION FOR PERMISSION TO APPEAL DATED DECEMBER 29, 1989 AND AFFIDAVIT (WITHOUT EXHIBITS) SUBMITTED TO THE STATE OF NEW YORK COURT OF APPEALS

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of
ASSAY PARTNERS,

Petitioner-Appellant,

For a Judgment pursuant to CPLR Article 78, or, in the alternative, for a Declaratory Judgment, or for such other Judgment and relief as is specified herein,

-against-

CITY OF NEW YORK, DEPARTMENT OF FINANCE
OF THE CITY OF NEW YORK
and ABRAHAM BIDERMAN as Commissioner,

Respondents-Respondents.

NOTICE OF MOTION FOR PERMISSION TO APPEAL

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Appendix M

PLEASE TAKE NOTICE that, upon the affidavit of Norman Sinrich, sworn to December 28, 1989, the record before the Appellate Division, First Department, the opinion and order of the Appellate Division, First Department, each dated August 10, 1989 and served upon petitioner-appellant on September 7, 1989, unanimously affirming the determination of respondent-respondent Abraham Biderman, as Commissioner of the Department of Finance of the City of New York, which denied petitioner-appellant's claim for a refund of New York City Real Property Transfer Tax, the order of this Court dated November 30, 1989 dismissing petitioner-appellant's appeal *sua sponte* upon the ground that no substantial constitutional question is directly involved and upon all the proceedings heretofore made herein, the undersigned will move this Court at a stated term thereof, appointed to be held at the Court House of the Court of Appeals in the City of Albany, State of New York on the 16th day of January, 1990, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for an order allowing an appeal to be taken herein by the petitioner-appellant to this Court from said order of unanimous affirmance, pursuant to CPLR § 5602(a)(1), and for such other and further relief in the premises as may be just and proper.

The motion for permission to appeal is made upon the ground that:

(a) this appeal raises an important question of constitutional law which has never been specifically addressed by this Court, namely whether, under the Supremacy Clause of the United States Constitution (Art. VI, Clause 2) a municipality may treat, for tax purposes,

grantees of the United States worse than an international political or economic organization; and

(b) the decision below, affirming the administrative determination to deny petitioner-appellant's claim for a tax refund, conflicts with this Court's decision in *Forbes Inc. v. Department of Fin. of New York*, 66 N.Y.2d 243, 487 N.E.2d 251, 496 N.Y.S.2d 394 (1985), *cert. denied*, 475 U.S. 1109 (1986) as well as the decisions of the United States Supreme Court in *Davis v. Michigan Dep't of Treasury*, __ U.S. __, 109 S. Ct. 1500 (1989), and *United States v. City of Manassas, Va.*, ___ U.S. ___, 108 S. Ct. 1568 (1988), *aff'g per curiam* 830 F.2d 530 (4th Cir. 1987).

Dated: New York, New York
December 29, 1989

/s/Norman Sinrich
Norman Sinrich
CHADBOURNE & PARKE
Attorneys for Petitioner-Appellant
Assay Partners
30 Rockefeller Plaza
New York, New York 10112
(212) 408-5100

Appendix M

TO: Clerk, New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Peter L. Zimroth, Esq.
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Appendix M

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of
ASSAY PARTNERS,

Petitioner-Appellant,

For a Judgment pursuant to CPLR Article 78, or, in the alternative, for a Declaratory Judgment, or for such other Judgment and relief as is specified herein,

-against-

CITY OF NEW YORK, DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK and ABRAHAM BIDERMAN as Commissioner,

Respondents-Respondents.

AFFIDAVIT

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Appendix M

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

NORMAN SINRICH, being duly sworn, states:

1. I am a member of the bar of the State of New York and a member of Chadbourne & Parke, attorneys for petitioner-appellant ("appellant") Assay Partners. I submit this affidavit in support of appellant's motion for permission to appeal to this Court from a unanimous order of the Appellate Division, First Department, which affirmed the administrative determination of respondent-respondent ("respondent") Abraham Biderman, as Commissioner of Finance of the City of New York, denying appellant's claim for a refund of New York City Real Property Transfer Tax.

QUESTIONS PRESENTED FOR REVIEW

2. Whether the New York City Real Property Transfer Tax (the "Tax") discriminates against the United States in violation of the Supremacy Clause of the United States Constitution (Article VI, clause 2):

(a) because grantees of the United States (like appellant) are subject to the Tax, but grantees of certain international organizations are exempt from the Tax, thus treating grantees of the United States worse than grantees of such international organizations; and

(b) because grantees of the United States (like appellant) are subject to the Tax, but grantees of charitable,

religious and educational organizations are exempt from the Tax, thus treating grantees of the United States worse than grantees of charitable, religious and educational organizations.

3. Whether, if the Tax is unconstitutional, appellant is entitled to receive interest on the amount of tax refundable to it, even though the New York City Administrative Code, and the regulations thereunder, provide that refunds of Tax shall be paid without interest.

PROCEDURAL HISTORY

4. On July 23, 1984, appellant timely filed with the respondent New York City Department of Finance (the "Department") a request for refund (with interest) of the Tax paid in connection with its purchase of a building located in New York City from the United States. The ground for the refund request was that imposition of the Tax in connection with a purchase from the United States was unconstitutional.

5. By letter dated September 10, 1984, the Department informally denied appellant's request for a refund. On October 10, 1984, appellant filed a Petition for Hearing with the Department. The Hearing was held on October 21, 1985.

6. In a "Final Determination" and "Decision" dated October 29, 1987, the Department, by Abraham Biderman, Commissioner of Finance, denied appellant's claim for refund. With respect to appellant's constitutional claims, the Decision set forth the

Department's conclusion of law that it lacked authority to rule on the constitutional issues presented.

7. On February 29, 1988, appellant commenced this proceeding in the Supreme Court, New York County, by filing its Petition and Memorandum of Law. Respondents subsequently filed a Verified Answer, Memorandum of Law and "Record of Hearing Before the Commissioner of Finance." On June 27, 1988, appellant filed its Memorandum of Law in Reply and an affidavit of Norman Sinrich, Esq.

8. In an order entered September 21, 1988, Justice Francis Pecora of the Supreme Court, New York County, referred this proceeding to the Appellate Division, First Department, for disposition. No opinion or memorandum was issued in the Supreme Court.

9. After briefing and argument, the Appellate Division, First Department, on August 10, 1989, issued its unanimous opinion and order, affirming the determination of respondent Abraham Biderman, Commissioner of Finance, and entering judgment in favor of respondents. Notice of entry of this order was served by hand upon appellant on September 7, 1989. A notice of appeal to this Court, under CPLR § 5601(b), was served and filed on October 4, 1989.

10. On November 30, 1989, this Court, *sua sponte*, dismissed appellant's appeal upon the ground that no substantial constitutional question is directly involved.

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11. Under CPLR § 5514, appellant's time to seek leave to appeal from this Court runs from the date of this Court's order dismissing appellant's appeal under CPLR § 5601 (b).

12. Copies of each order below, together with notice of entry thereof, and of the opinions of respondent Abraham Biderman, Commissioner of Finance and of the Appellate Division, First Department, are attached hereto as follows:

Exhibit A - Order of the Court of Appeals dated November 30, 1989

Exhibit B - Order of the Appellate Division

Exhibit C - Opinion of the Appellate Division

Exhibit D - Order of the Supreme Court, New York County, referring proceeding to the Appellate Division

Exhibit E - Final Determination and Decision of Respondent Commissioner of the Department of Finance of the City of New York dated October 29, 1987.

As provided in 22 NYCRR § 500.11(d)(3), appellant also submits, separately, one copy of each of the briefs submitted in the Appellate Division, First Department.

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JURISDICTIONAL STATEMENT

13. This Court has jurisdiction to hear this appeal under CPLR § 5602(a)(1)(i). The order of the Appellate Division, First Department, appealed from finally determines this action. It states:

> "It is unanimously ordered that the determination of the respondent Commissioner be and the same hereby is confirmed, without costs and without disbursements. The clerk is directed to enter judgment in favor of respondents confirming the determination."

14. Since the determination of the Commissioner was a denial of appellant's request for refund of tax, all issues below have been finally determined.

/s/Norman Sinrich
Norman Sinrich

Sworn to before me this
28th day of December, 1989.

/s/Donald W Rose
Notary Public

/STAMP/